

NEW
 COMMENTARIES
 ON
 THE LAWS OF ENGLAND.

PARTLY FOUNDED ON BLACKSTONE

BY
 HENRY JOHN STEPHEN,
 SERJEANT AT LAW.

'For his useful and judicious illustration of the law, and for his perspicuous expressing of that I do perceive I am otherwise cautious and attentive to it, etc. as little from any party, with its terms or just as my talent with truth and the presence of knowledge' — Lord Bacon Adv. of Learning.

Fifth Edition.

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NEW COMMENTARIES
ON
THE LAWS OF ENGLAND.



BOOK V.
OF CIVIL INJURIES—(*continued*).



CHAPTER XII.
OF PREROGATIVE WRITS, AND OTHER EXTRA-
ORDINARY REMEDIES IN THE COURTS
OF COMMON LAW.



WE have now taken a view of the method of proceeding in all actions, whether regular or irregular, (if those terms may be used,) which are known in the modern practice.

The common law however affords, in certain cases of civil injury, other remedies, of a nature generically different from an action, and to these we propose to devote the following chapter. But as the proceedings in them are generally introduced by that kind of application to the court, which is technically called a *motion*, it will be proper to premise some explanation as to the nature of a motion in general. And here we shall confine ourselves to appli-

cations to the court in *banc*, to which alone the name of motions is properly applied; not deeming it necessary to take any particular notice of such applications as are made to a *single judge at chambers*, a branch of practice more summary in its nature than the former, and turning for the most part on matters of subordinate importance (a).

A motion, then, is an application made to the judges, *vivâ voce*, in open court, and it may be either incidental to an action,—a relation in which we have already had occasion sometimes to refer to it,—or it may be wholly unconnected with that kind of remedy. In the superior courts, it can be made by none but a counsel or barrister, to the exclusion of attornies; and the practice of every court requires that it should, in general, be supported by *affidavit* of the matter of fact on which it is founded (b). Its

(a) As to proceedings before a single judge, see Bagley's Chamber Practice; Lush's Pr., pp. 668—678, 2nd edit. And see 11 Geo. 4 & 1 Will. 4, c. 70, s. 4, and 1 & 2 Vict. c. 45, s. 2. The importance of the practice at chambers, has been now increased by the Common Law Procedure Acts; particularly by the provision of 15 & 16 Vict. c. 76, s. 52, authorizing the sufficiency of pleadings, in certain cases, to be decided upon by a judge at chambers.

(b) *Affidavits* are made on various occasions in the course of judicial proceedings, and are sworn before the court or some officer appointed to take affidavits in such court. (As to such officers, see 22 Vict. c. 16.) It may be remarked here, that a practice formerly obtained of making *voluntary* affidavits, i. e. affidavits sworn before magistrates or others, in matters on which no judicial inquiry was pending; but by 5 & 6 Will. 4, c. 62, this practice is now

prohibited, and a form of *declaration* substituted for such voluntary affidavits. And it is provided that any person making such declaration falsely, shall be guilty of a misdemeanor. This declaration is also substituted for the affidavits that used formerly to be taken to verify documents, &c., in the different departments of the state. It is further to be remarked, that the provisions of 17 & 18 Vict. c. 125, s. 20, and 24 & 25 Vict. c. 66, (vide sup. vol. III. p. 635,) by which witnesses, either in civil or criminal proceedings, unwilling from alleged conscientious motives to be sworn on oral examination, are permitted to make *affirmation* in lieu of oath, applies also to persons called upon to make affidavit or deposition. See also 17 & 18 Vict. c. 125, s. 45, as to the affidavits allowed in answer to affidavits in support of motions; sect. 48, as to the examination, before a judge or master, of persons refusing to make affidavit when required to do so by

object, in a general point of view, is to obtain an order, —called, in the superior courts of common law, a *rule* (c),— directing some act to be done in favour of the applicant; which rule, when obtained, is served (d) upon the party by whom the act is to be performed. The rule so moved for, is in its form usually a rule to *show cause*, (otherwise called a rule *nisi*,) commanding the party, on a certain day therein named, to show cause to the court, why he should not perform the act, or submit to the terms therein set forth; but in some cases, where the right to the relief prayed for is very clear, it is a rule *absolute in the first instance*, commanding the thing to be done, without the appointment of any day to show cause. Upon the day appointed by the rule *nisi*, the counsel for the party on whom it was served, accordingly appears, and is heard in opposition to it; and, the counsel by whom it was moved having been afterwards heard in reply, the court either discharges the rule, or makes it absolute, as the case may be; and that upon the terms either that the costs of the application be paid by one of the parties to the other, or without costs, as may appear most equitable under the circumstances of the case. But if the party served with the rule, fail to appear in opposition to it, it is made absolute as a matter of course. If made absolute, a new rule to that effect is then served on the party ruled; who is bound to obey it upon peril of a writ of attachment as for a contempt (e),—a writ issued by the court in vindication of its own authority, and under which the party attached is liable to coercion by the arrest of his person.

any party to any civil proceeding in the superior courts; and 6 Geo. 4. c. 87; 15 & 16 Vict. c. 76, s. 23; 18 & 19 Vict. c. 42, as to the admission, in the courts here, of affidavits duly administered abroad.

(c) By Reg. Gen. H. T. 1853, (Pr.) r. 149, every rule of court must be dated the day of the week,

month and year on which the same is drawn up, without reference to any other time or date.

(d) As to the time and manner of service of rules, see Reg. Gen. H. T. 1853, (Pr.) rr. 162—167; E. T. 1856:

(e) Vide sup. vol. III. p. 380.

We shall now resume the main subject of the chapter, viz. the consideration of such of the remedies afforded at common law, as are distinct, in their nature, from an action. These chiefly consist of what are called *prerogative writs*: [which do not issue as of mere course, without showing some probable cause why the extraordinary powers of the Crown are called in to the party's assistance (g);] and they are principally as follows:

I. The writ of *Procedendo*. This [issues out of the Court of Chancery, when judges of any subordinate court do delay the parties, for that they will not give judgment, either on the one side or the other, when they ought so to do (h).] In such case a writ of *procedendo ad judicium* [shall be awarded, commanding the inferior court, in the name of the Crown, to proceed to judgment, but without specifying any particular judgment; for that, if erroneous, may be set aside by proceedings in error, or by writ of false judgment. And upon further neglect or refusal, the judges of the inferior court may be punished for their contempt by writ of attachment,] returnable in the courts at Westminster. A *procedendo* may also be awarded out of any of the superior courts, where an action has been removed to it from an inferior court, and it appears to the superior court that it was removed on insufficient grounds (i). And by 21 Jac. I. c. 23, a suit once so

(g) 3 Bl. Com. 132. In *R. v. Cowle*, Burr. 855, prerogative writs are also distinguished from writs ministerially directed, viz. those issued to the sheriff; the prerogative writs being generally directed to no sheriff or minister of the court; but to the public or private parties, whose acts are the subject of complaint.

(h) F. N. B. 153, 240. In such

cases, however, the writ of *mandamus* from the Court of Queen's Bench is a concurrent remedy, and one more frequently resorted to in practice. As to the writ of *mandamus*, vide post, p. 5.

(i) See 21 Jac. I. c. 23; Jac. Dict. *Procedendo*; *Blanchard. v. De la Crouée*, 9 Q. B. 869; Reg. Gen. 1853, (Pr.) r. 116.

remanded, shall not be again removed, before judgment, into any court whatsoever.

II. The writ of *Mandamus*. In treating of which we shall refer mainly, and in the first instance, to the common law or *prerogative* writ of *mandamus*; though we shall add a few words as to another species recently introduced by the statute 17 & 18 Vict. c. 125, and which may be described as the *mandamus* incidental to an action (*j*).

1. Taking the term of *mandamus* in its first sense,—the power of issuing this writ, belongs exclusively to the Court of Queen's Bench. [It is a high prerogative writ, of a most extensive remedial nature;] and is in its form a command issuing in the Queen's name, from the Court of Queen's Bench, and [directed to any person, corporation, or inferior court of judicature, within the Crown's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty; and which the court has previously determined, or at least supposes, to be consonant to right and justice.] In its application, it may be considered as confined to cases where relief is required in respect of the infringement of some *public* right or duty (*k*), and where no effectual relief can be obtained in the ordinary course of an action at law (*l*). Such is the general principle;

(*j*) Even prior to this Act, there was a *mandamus* auxiliary to an action, viz. the *mandamus* to examine witnesses in India and other British dominions in foreign parts. (See 13 Geo. 3, c. 63, s. 44, and 1 Will. 4, c. 22, s. 3^d.) The *mandamus*, in such cases, may be awarded by any of the superior courts at Westminster.

(*k*) *R. v. Bank of England*, 2 B. & Ald. 622.

(*l*) See *R. v. Bishop of Chester*, 1 T. R. 396; *R. v. Archbishop of*

Canterbury, 8 East, 219; *Ex parte Robins*, 1 W. W. & H. 578; *R. v. Nottingham Old Water Works Company*, 6 A. & El. 355; *R. v. Bristol Dock Company*, 2 Q. B. 69; *The Queen v. Lancashire and Yorkshire Railway Company*, 1 Ell. & Bl. 228. It is no objection to granting a *mandamus*, that the party against whom the complaint is made, may be proceeded against by indictment. *R. v. Severn Railway Company*, 2 B. & Ald. 646.

but as to the specific instances in which the writ will be granted, they are much too numerous for complete detail (*m*). We may remark, however, that (among other cases) this writ lies to compel the admission or restoration of the applicant [to any office or franchise of a public nature, (whether spiritual or temporal,) to academical degrees, to the use of a meeting house, or the like.] And that it will be also granted [for the production, inspection, or delivery, of public books and papers; or to compel the surrender of the regalia of a corporation; or to oblige bodies corporate to affix their common seal; or to compel the holding of a court;] or the proceeding to an election in corporate and other public offices (*n*). In addition to which, we may notice, as another important application of this writ, [that it issues to the judges of any inferior court (*o*), commanding them to do justice according to the power of their office, whenever the same is delayed. For it is the peculiar business of the Court of Queen's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the Crown or legislature have invested them; and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice (*p*).

(*m*) A copious enumeration of them will be found in 1 Chit. Gen. Pr. of Law, 789. See also Tapping on *Mandamus*; and the recent cases of *Ex parte Lee*, Ell. Bl. & Ell. 863, and the *Queen v. Southampton (Commissioners, &c.)*, 1 Ell. Bl. & S. 5.

(*n*) See 11 Geo. 1, c. 4; and 7 Will. 4 & 1 Vict. c. 78, s. 24; *R. v. Mayor, &c. of London*, 1 T. R. 146; *R. v. Leyland*, 3 M. & S. 184; *R. v. Norwich*, 1 B. & Adol. 310.

(*o*) It is provided, however, by 19 & 20 Vict. c. 108, s. 43 (amended by 21 & 22 Vict. c. 74, s. 4), as to the County Courts, that no *mandamus* shall henceforth issue to a judge or

officer of any such court, for refusing to do any act relating to the duties of his office; but that application must be made to any of the superior courts of law, for a rule to show cause why such act should not be done. See also as to such refusal, by a stipendiary or other magistrate, 11 & 12 Vict. c. 44, s. 5; *R. v. Ingham*, 17 Q. B. 884; *R. v. Paynter*, 28 L. T. (Q. B.) 308; *R. v. Dayman*, 29 L. T. (Q. B.) 125.

(*p*) As to the time of application for a writ of *mandamus* to justices, to enter continuances and hear an appeal, see Reg. of Richmond, 1 E. Bl. & El. 253, et Reg. Gen. *ibid.* p. 255.

[This writ is granted on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below (q); whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition,] a rule is made,—except under particular circumstances, where a rule will be granted absolute in the first instance (r),—[directing the party complained of to show cause why a writ of *mandamus* should not issue. And if he shows no sufficient cause,] and does not submit without contest to the application, [the writ itself is issued at first in the alternative, either to do this, or signify some reason to the contrary; to which a *return* or answer must be made at a certain day.]

[If the person to whom the writ is directed makes no return, he is punishable for his contempt by attachment.] If, on the other hand, he makes a return, and it be found either insufficient in law, or false in fact, there then issues, in the second place, a *peremptory mandamus* to do the thing absolutely; [to which no other return will be admitted but a certificate of perfect obedience, and due execution of the writ (s).] The sufficiency of the return, in *point of law*, was formerly determined, unless a special argument were ordered, in a summary way upon motion; but as to the truth of its allegations *in point of fact*, it was a rule that this could not be investigated by any further proceeding on the *mandamus*;—the complaining party having no remedy in case the facts were untruly alleged, but to bring an action on the case for a false return. In

(q) Unless there has been a distinct refusal to do that which it is the object of the *mandamus* to enforce, the writ will not be granted. (*R. v. Brecknock, &c. Company*, 3 A. & E. 217.)

(r) See *R. v. Archdeacon of Lichfield*, 5 Nev. & M. 42; *Ex parte Penruddock*, 1 Har. & W. 347; *R. v. Fox*, 2 Q. B. 246; *R. v. Churchwardens of Manchester*, 7 Dowl.

707. And see 6 & 7 Vict. c. 89, s. 5; 17 & 18 Vict. c. 125, s. 76, as to the notice to be given, in cases affecting corporate offices, to the opposite party of the application, and as to making the rule absolute in the first instance, if the court think fit; and as to the time at which the writ may be made returnable.

(s) *R. v. Ledgard*, 1 Q. B. 616.

which action, if he obtained a verdict, he recovered [damages equivalent to the injury sustained, together with a peremptory *mandamus* to the defendant.] But by 9 Ann. c. 20, in a *mandamus* for determining the right to a corporate office, and now by 1 Will. IV. c. 21, in *all* cases of *mandamus*, [the return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue or demur, and the same proceedings may be had as if an action on the case had been brought for making a false return. And after the prosecutor has obtained judgment, he shall have a peremptory writ of *mandamus* to compel his admission or restitution (*t*).] So that now the writ of *mandamus* is, (from the period at least of its return,) assimilated to an action; and the more closely, because by the same Acts it is also provided, that the prosecutor, if successful, shall recover damages, and that the successful party shall in all cases, upon judgment after issue joined, or by default, be entitled to his costs (*u*). In addition to which, it has been enacted by 6 & 7 Vict. c. 67, that the prosecutor objecting to the validity of the return, shall do so by way of demurrer to the same, in like manner as in an action; and thereupon the writ, return and demurrer shall be entered on record, and the court shall adjudge either that the return is valid in law, or that it is not valid in law, or that the writ of *mandamus* itself is not valid in law. And if the court adjudge that the writ is valid, but the return invalid, it shall proceed to award a peremptory *mandamus*; and

(*t*) See 11 Rep. 79.

(*u*) As to the course of proceeding on *mandamus*, see *R. v. Oundle*, 1 A. & E. 283; *R. v. Governors of Darlington School*, 6 Q. B. 682; *Ex parte Thompson*, *ibid.* 721; *Clarke v. Leicestershire and Northamptonshire Canal Company*, *ibid.* 898; *The Queen v. Ambergate Railway Company*, 17 Q. B. 957.

By 1 Will. 4, c. 21, s. 8, the costs of the application for a *mandamus*, whether granted or refused, and the costs of the writ, where issued and obeyed, are in the discretion of the court. (See *R. v. Oundle*, *ubi sup.*; *R. v. Eastern Counties Railway Company*, 2 Q. B. 578; *R. v. St. Pancras*, 2 Dowl. N. S. 955; *The Queen v. Ingham*, 17 Q. B. 884.)

shall also, in any event, award costs to be paid to the successful party. The 1 Will. IV. c. 25, also provides, that either party shall be at liberty in every case where judgment is given against him upon a *mandamus*, (whether after demurrer or otherwise,) to take proceedings in error thereon, according to the ordinary course of error in actions (v).

Besides these provisions with respect to *mandamus*, we may notice the enactment of 1 & 2 Will. IV. c. 58, s. 8, intended to afford relief to officers and other persons to whom such writ is directed to issue, commanding them to admit to offices, or to do or perform other matters in respect of which they claim no right or interest. It is provided in favour of such persons, that it shall be lawful for the court to which application is made for the writ of *mandamus*, to relieve them from the liabilities incident to the execution thereof, by calling upon any other person, having or claiming any interest in the matter of such writ, to appear and show cause against the issuing of the same; and thereupon to make such rules and orders between all parties as the circumstances of the case may require.

2. As to the *mandamus* which we have described, as *incidental to an action*, it is provided by 17 & 18 Vict. c. 125, ss. 68—76 (x), that the plaintiff in any action, (except replevin and ejectment,) in any of the superior courts, may indorse upon the writ of summons and the copy to be served, a notice that the plaintiff intends to claim a writ of *mandamus* commanding the defendant to perform some duty in which the plaintiff is interested (y). And the plaintiff may accordingly make such claim afterwards in his decla-

(v) It is also provided by 17 & 18 Vict. c. 125, s. 77, that the provisions both of that Act, and of the 15 & 16 Vict. c. 76, so far as they are applicable, shall apply to the proceedings and pleadings upon a prerogative writ of *mandamus* issued by the Court of Queen's Bench.

(x) As to the *costs* of such writ of

mandamus, see 23 & 24 Vict. c. 126, s. 32.

(y) As to the cases in which this species of *mandamus* will lie, see *Benson v. Paull*, 6 Ell. & Bl. 373; *Norris v. Irish Land Company*, 8 Ell. & Bl. 512; *Ward v. Lowndes*, 28 L. J. (Q. B.) 265.

ration—either together with any other demand capable of being enforced in such action, or separately,—setting forth therein the grounds of such claim; and that though performance of the duty has been demanded, it has been neglected or refused. If judgment is given in such action, that a *mandamus* do issue, a peremptory writ of *mandamus*, (besides the ordinary execution proper to the action,) is to issue accordingly, commanding the defendant forthwith to perform the duty; and in case of disobedience, it may be enforced by attachment. Or the court may, on application of the plaintiff, direct that the act shall be done by the plaintiff, (or by some person appointed for the purpose by the court,) at the expense of the defendant.

III. The writ of *Prohibition* (*z*). [A prohibition is a writ issuing properly only out of the Court of Queen's Bench (*a*); but for the furtherance of justice, it may now also be had in some cases out of the Court of Chancery, Common Pleas, or Exchequer (*b*); directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof,—upon a surmise either that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. This writ may issue either to inferior courts of common law,—as to the courts of the counties palatine, if they hold plea of land or other matters not lying within their respective franchises (*c*);] or to a borough or other court of record, if it attempts to entertain any matter not within its jurisdiction (*d*);—or to

(*z*) As to prohibition, see the following modern cases:—*Ex parte Tucker*, in re *Inman*, 1 M. & Gr. 519; *Tucker v. Tucker*, 4 Man. & Gr. 1074; *Hassach v. Cambridge University*, 1 Q. B. 593; *Re Dean of York*, 7 Q. B. 1; *Evans v. Gwynnt*, 5 Q. B. 844; *Francis v. Steward*, *ibid.* 984; *De Haber v. Queen of Portugal*, 21 L. J. (Q. B.) 488.

(*a*) *Company of Horners*, 2 Roll.

Rep. 471.

(*b*) *Hutton's case*, Hob. 27; 1 P. Wms. 476; *Palmer*, 523. See *Ex parte Smyth*, 1 Tyr. & G. 225; and *Ex parte Tucker*, in re *Inman*, 1 Man. & G. 529; *Tucker v. Tucker*, 4 Man. & G. 1074.

(*c*) *Vaughan v. Evans*, *Ld. Raym.* 1408.

(*d*) 3 Bl. Com. p. 112. Blackstone gives, as one example, the

[the courts christian, the university courts, or the Court of Admiralty, where they concern themselves with any matter not within their jurisdiction; as if the first should attempt to try the validity of a custom pleaded (*e*), or the last a contract made or to be executed within this kingdom (*f*). Or if, in handling of matters clearly within their cognizance, courts of justice transgress the bounds prescribed to them by the laws of England (*g*);] as where a spiritual court requires two witnesses to prove a release or payment of tithes (*h*), or the like; in such cases also a prohibition will be awarded (*i*). [For as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in such courts, because incident or accessory to some original question clearly within their jurisdiction, it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal law; else the same question might be determined

county court, meaning thereby the sheriff's court, which, in his time, held pleas of debt and damages under 40s. It will, however, be remembered, that since the introduction of the district county courts, under 9 & 10 Vict. c. 95, this is no longer the case (vide sup. vol. III. pp. 393 et seq.) As to the writ of prohibition in reference to the district county courts, see 13 & 14 Vict. c. 61, s. 22; 19 & 20 Vict. c. 108, ss. 40—42, 44; *Toft v. Rayner*, 5 C. B. 162; *Ellis v. Watt*, 8 C. B. 614; *Fearon v. Norvall*, 5 D. & L. 439; *Marsden v. Wardle*, 3 Ell. & Bl. 695; *Jackson v. Beaumont*, 11 Exch. 300; *Knox v. Shepherd*, 2 L. T., N. S. 351.

(*e*) *Vanacre v. Spleen*, Carth. 33. The spiritual courts have power to construe a statute, the effect of which incidentally comes before them in the course of a proceeding where they have jurisdiction. (*Hall v.*

Maule, 7 Ad. & El. 721.)

(*f*) But see 24 Vict. c. 10, ss. 5, 6, 8, 10, 11, &c., which make it necessary to take Blackstone's illustration here, with some qualification.

(*g*) If sentence has been given in the court below, the court in which application is made for a prohibition will presume that there was no excess of jurisdiction, unless such excess be distinctly proved, or be apparent on the face of the proceedings. (*See Hart v. Marsh*, 5 Ad. & Ell. 591.)

(*h*) *Mallory v. Marriott*, Cro. Eliz. 667; *Hob. 188*.

(*i*) A prohibition will not be awarded in reference to a mere point of practice, where the court has jurisdiction on the general subject of the cause. See *Ex parte Smyth*, 1 Tyr. & G. 227; *Jolly v. Baines*, 12 Ad. & El. 201; *Ex parte Story*, 12 C. B. 767.

[different ways according to the court in which the suit is depending; an impropriety which no wise government can or ought to endure, and which is therefore a ground of prohibition (i).

A short summary of the method of proceeding in prohibition, is as follows. The party aggrieved in the court below applies to the superior court, setting forth the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom.] And this used formerly to be done by filing, as of record, a *suggestion*, containing a formal state of the facts; but now by 1 Will. IV. c. 21, it is provided, that it shall not be necessary to file any suggestion, but that an application for a writ of prohibition may be made by *affidavits* only, that is, in the way of an ordinary motion, by a rule to show cause; upon which, if the matter alleged appear to the court, upon the showing cause, to be sufficient, the writ of prohibition immediately issues, commanding the judge not to hold, and the party not to prosecute, the plea. [But sometimes the point may be too nice and doubtful to be decided merely upon a motion; and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare* in prohibition(k);]

(i) Blackstone remarks (vol. iii. p. 113), that “so long as the idea continued among the clergy, that the ecclesiastical state was wholly independent of the civil, great struggles were constantly maintained between the temporal courts and the spiritual, concerning the writ of prohibition and the proper objects of it. Even from the time of the constitutions of Clarendon; made in opposition to the claims of Archbishop à Becket, in 10 Hen. 2, to the exhibition of certain articles of complaint to the king, by Archbishop Bancroft, in the third year of James the first,

“on behalf of the ecclesiastical courts. From which articles, and from the answers to them signed by all the judges of Westminster Hall, much may be collected concerning the reasons of granting, and methods of proceeding upon, prohibitions.” He cites 2 Inst. 601—618.

(k) See a recent instance, *White v. Steel*, 5 L. T. (N. S.) 449, C. B. A declaration in prohibition will always be directed, on the application of the person against whom the prohibition is sought. (*Remington v. Dolby*, 9 Q. B. 176.) With respect, however, to applications for a writ of prohibition to a *County*

that is, to deliver a declaration against the other, setting forth, in a concise manner, so much of the proceeding in the court below, as may be necessary to show the ground of the application, and praying that a writ of prohibition may issue (*l*). And this used formerly to be connected with an allegation that the party sued on behalf of the Crown as well as of himself; and with a supposition or fiction—which was not traversable (*m*)—that the defendant had proceeded in the suit below, notwithstanding a writ of prohibition. But by the statute just mentioned, the use of these forms is now expressly abolished. And it is provided, that to this declaration, the party defendant may demur, or plead such matters, by way of traverse or otherwise, as may be proper to show that the writ ought not to issue, and shall conclude by praying that such writ may not issue—that judgment shall be given that the writ of prohibition do or do not issue, as justice may require—and that the party in whose favour judgment shall be given (whether on nonsuit, verdict, demurrer, or otherwise) shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same. And, further, that in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given; but that such assessment shall not be necessary to entitle the plaintiff to costs. The effect of the legislative provisions here cited, has consequently been to place prohibitions, after a rule to declare has been obtained, upon a footing substantially of an action; and in this respect it exhibits, we see, a close resemblance to a mandamus (*n*). After a writ of prohibition has been issued, if either the judge of the court below, or a party, shall proceed in disobedience to it, [an

Court, it is provided by 19 & 20 Vict. c. 108, s. 42, that the matter shall be finally disposed of by rule or order, and no declaration, or further proceedings in prohibition, allowed.

(*l*) 1 Will. 4, c. 21, s. 1.

(*m*) Barn. Not. 4to. 148.

(*n*) For the former course of proceeding in prohibition, see Com. Dig. Prohibition (H); Bac. Ab. Prohibition.

[attachment may be had against them to punish them for the contempt, at the discretion of the court that awarded it, and an action will lie against them to repair the party injured in damages (o).]

IV. Another remedy analogous to these, is the writ of *Quo warranto*. [This writ is in the nature of a writ of right for the Crown (p), against him who claims or usurps any office (q), franchise, or liberty (r),—to inquire by what authority he supports his claim, in order to determine the right (s). It lies also in case of non-user or long neglect of a franchise, or mis-user or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. This was originally returnable before the king's justices at Westminster (t); but afterwards only before the justices in eyre, by virtue of the statutes of *quo warranto*, 6 Edw. I. c. 1, and 18 Edw. I. st. 2 (u). But since those justices have given place to the king's temporary commissioners of assize (x),—the judges on the several circuits,—this branch of the statutes lost its effect (y). And writs of *quo warranto*, (if brought at all,) must now be prosecuted and determined before the king's justices at Westminster. And in case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the Crown,—for that the party is entitled to no such franchise, or hath disused or abused it,—the franchise is either seized into the sovereign's hands, to be granted out again to whomsoever he shall please, or, if it

(o) F. N. B. 40; 2 Inst. 601—618.

(p) R. v. Shepherd, 4 T. R. 381.

(q) See Darley v. The Queen, 12 Cl. & Finn. 520; R. v. Mousley, 16 L. J. (Q. B.) 89; Re Barlow, 30 L. J. 271 (Q. B.) As to offices, vide sup. vol. II. p. 640.

(r) R. v. Archdall, 8 Ad. & El.

281; and as to franchises and liberties, vide sup. vol. I. p. 670.

(s) Finch, L. 322; 2 Inst. 282.

(t) Old Nat. Brev. fol. 107, edit. 1534.

(u) 2 Inst. 498; Rast. Entr. 540.

(x) Vide sup. pp. 430 et seq.

(y) 2 Inst. 498.

[be not such a franchise as may subsist in the hands of the Crown, there is merely judgment of *ouster*, to turn out the party who usurped it (z).

The judgment on a writ of *quo warranto*, (being in the nature of a writ of right,) is final and conclusive even against the Crown: which, together with the length of its process, probably occasioned that disuse into which it is now fallen; and introduced a more modern method of prosecution, by *information* filed in the Court of Queen's Bench by the attorney-general, in the nature of a writ of *quo warranto*;—wherein the process is speedier, and the judgment not quite so decisive. This is properly a *criminal* method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him or seize it for the Crown (a). But it hath long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor (b); the fine

(z) R. v. Stanton, Cro. Jac. 259; R. v. Mayor of London, 1 Show. 280.

(a) Blackstone remarks, (vol. iii. pp. 263, 264,) that “during the violent proceedings that took place in the latter end of the reign of King Charles the second, it was, among other things, thought expedient to new-model most of the corporation towns in the kingdom. For which purpose many of those bodies were persuaded to surrender their charters; and in formations in the nature of *quo warranto* were brought against others, upon a supposed, or frequently a real forfeiture of their franchises by neglect or abuse of them. And the consequence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters, with such alterations as were thought expedient; and,

“during their state of anarchy, the Crown named all their magistrates. This exertion of power, though perhaps *in summo jure* it was for the most part strictly legal, gave a great and just alarm; the new-modelling of all corporations being a very large stride towards establishing arbitrary power. And therefore it was thought necessary, at the Revolution, to bridle this branch of the prerogative, at least so far as regarded the metropolis, by statute 2 W. & M. c. 8; which enacts, that the franchises of the city of London shall never hereafter be seized or forejudged for any forfeiture or misdemeanor whatsoever.”

(b) It is discretionary, however, in the court to grant or withhold a *quo warranto* information in such cases. (R. v. Parry, 6 Ad. & El. 810.)

[being nominal only (c).] It is therefore considered in modern practice as merely a civil proceeding (d).

This proceeding is now applied as [between party and party, without any intervention of the prerogative, by virtue of the statute 9 Anne, c. 20; which permits an information in the nature of *quo warranto* to be brought with leave of the court, at the relation of any person desiring to prosecute the same,—who is then styled the *relator* (e),—against any person usurping, intruding into, or unlawfully holding any franchise, or office, in any city, borough, or town corporate (f).] The same Act provides for the speedy determination of such information (g);

(c) See the difference in the application of *mandamus* and *quo warranto* respectively illustrated in the cases of *R. v. Oxford*, 6 Ad. & El. 349; *R. v. Winchester*, 7 Ad. & El. 215; *R. v. Phippen*, *ibid.* 970. After an office is determined, an information in *quo warranto* to try the title thereto will not be granted. (*Re Harris*, 6 Ad. & El. 475.) An information in *quo warranto* does not lie for exercising the office of guardian to a poor law union. (*Re Aston Union*, *ibid.* 784.) But it lies in respect to the office of clerk to a board of guardians appointed by statute. (*Queen v. St. Martin's in the Fields*, 17 Q. B. 149.) It does not lie in respect of the office of clerk to the justices of a borough. (*The Queen v. Fox*, 8 Ell. & Bl. 939.)

(d) 4 Bl. Com. 312. In virtue of its being considered as a civil proceeding, the court will grant a new trial, though the verdict should have been for defendant. (*R. v. Francis*, 2 T. R. 484.) The Common Law Procedure Act, 1852, does not, however, apply to an information in *quo warranto*. (*Reg. v. Seale*, 5 Ell. & Bl. 1.)

(e) By Reg. Gen. M. T. 3 Vict.

(sec 11 Ad. & El. 2) no rule shall hereafter be granted for filing any information in the nature of a *quo warranto*, unless, at the time of moving, an affidavit be produced, by which some person or persons shall depose, that such motion is made at his or their instance, as relator or relators. And such person or persons shall be deemed to be the relator or relators, in case such rule shall be made absolute, and shall be named as such relator or relators in such information, in case the same shall be filed, unless the court shall otherwise order. (See *R. v. Hedges*, 11 Ad. & El. 163; *R. v. Anderson*, 2 Q. B. 740.) As to who may be relator, see *R. v. Parry*, 6 Ad. & El. 810; *R. v. Greene*, 2 Q. B. 460. And see 6 & 7 Vict. c. 89, s. 5, as to the notice to be given to the opposite party of the application. &c.

(f) But an information in *quo warranto* cannot be brought against a body corporate at large, for acting as a corporation, unless at the instance of the attorney-general. *R. v. White*, 5 Ad. & El. 613.

(g) By 6 & 7 Vict. c. 89, s. 5, the court may order the venue in infor-

and directs [that if the defendant be convicted, judgment of ouster, (as well as a fine,) may be given against him; and that the relator shall pay or receive costs according to the event of the suit.] By the 32 Geo. III. c. 58, intituled “An Act for the Amendment of the Law upon Information in the nature of *Quo Warranto*,” it is also provided that the defendant may plead in bar to any information in *quo warranto* in respect of any office in a town corporate, (whether exhibited by leave of the court, or by the attorney-general on behalf of the Crown,) that he first took upon himself such office, six years or more before the exhibiting the information; and that such plea may be pleaded with any other pleas that the court may allow, and may be met by a replication that a forfeiture of such office happened within the period of that limitation. And it is further provided, that the title of the defendant derived under any election shall not be affected on account of defect of the title in the person electing,—provided the elector shall have been in the exercise *de facto* of his office, six years previous to the information. And by later statutes, 7 Will. IV. & 1 Vict. c. 78 and 6 & 7 Vict. c. 89, it is further enacted, that every application to the Queen’s Bench, for the purpose of calling upon any person to show by what warrant he claims to exercise the office of mayor, alderman, or burgess, in any borough within the Municipal Corporation Act, shall be made before the end of twelve months after the election of the defendant, or the time when he shall become disqualified;—that no election of any mayor shall be liable to be questioned by reason of a defect in the title of such person to the office of alderman or councillor to which he may have been previously elected, unless application shall have been made to the Court of Queen’s Bench, calling upon such person to show cause by what warrant

mations in *quo warranto* to be laid in Middlesex or London, and the trial to take place therein. See

also as to changing venue in *quo warranto*, *Clerk v. The Queen*, 9 House of Lords’ Cases, p. 184.

he claims to exercise such office of alderman or councillor, within twelve months after his election thereto;—and that every election to the office of mayor, alderman, councillor, or any other corporate office within the said boroughs, which shall not have been called in question within twelve months after such election, shall be deemed good and valid.

V. The writ of *Habeas Corpus*. This is the most celebrated writ in the English law, and the great remedy which it has provided for the violation of the right of personal liberty (*i*). We had occasion, in the first volume (*k*), to make some remarks upon this writ, but a more particular detail of its history, and the practice connected with it, may here be acceptable.

In the first place, we may remark that the vindication of liberty, though the principal, is not the only purpose to which it is applied; for, of the *habeas corpus* [there are various kinds made use of by the courts at Westminster, for removing prisoners from one court to another for the more easy administration of justice. Such is the *habeas corpus ad respondendum*, when a man hath a cause of action against one who is confined by the process of some inferior court, in order to remove the prisoner and charge him with

(*i*) As to the remedy by action for false imprisonment, vide sup. vol. iii. p. 498. Blackstone notices, (vol. iii. p. 128,) besides the *habeas corpus*, three other writs for removing the injury of false imprisonment: 1st, The writ of *mainprize*, *manu captio*, commanding the sheriff to take sureties for the appearance of the prisoner, usually called *mainpernors*, and to set him at large; 2nd, The writ *de odio et atia*, commanding the sheriff to inquire whether a prisoner charged with murder was committed on ge-

neral cause of suspicion, or merely *propter odium et atiam*, for hatred and ill will,—with the view, if the latter was found the case, of afterwards issuing another writ to admit him to bail; 3rdly, the writ *de homine replegiando*, commanding the sheriff to replevy a man out of custody in the same manner that chattels taken in distress may be replevied, upon security given that he shall answer any charge against him. All these remedies however have long fallen into complete disuse.

(*k*) Vide sup. vol. i. p. 149.

[this new action in the court above (*l*). Such is that *ad satisfaciendum*, when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with the process of execution (*m*). Such are also those *ad prosequendum*, *testificandum*, *deliberandum*, &c., which issue when it is necessary to remove a prisoner in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed (*n*). Such is, lastly, the common writ *ad faciendum et recipiendum*, which issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer—whence the writ is frequently denominated a *habeas corpus cum causâ*,—to do and receive whatsoever the king's court shall consider in that behalf (*o*). This is a writ grant-

(*l*) Jones's case, 2 Mod. 198.

(*m*) 2 Lilly, Pract. Reg. 4; Gibb v. King, 1 C. B. 1. By 15 & 16 Vict. c. 76, s. 127, a *habeas corpus ad satisfaciendum* shall not in future be necessary to charge in execution a person already in the prison of the court. But he may be charged in execution by a judge's order, made on affidavit that judgment has been signed; and if not satisfied, service of such order on the gaoler shall have the effect of a detainer. See also 25 & 26 Vict. c. 104, s. 2, cited sup. vol. III. p. 239, n. (*l*).

(*n*) As to writs of *habeas corpus ad testificandum*, &c., see 43 Geo. 3, c. 140, and 44 Geo. 3, c. 102; Graham v. Glover, 5 Ell. & Bl. 591; Marsden v. Overbury, 18 C. B. 34; Ex parte Cobbett, 3 H. & N. 155; Binns v. Mosley, 2 C. B. (N. S.) 116. By 16 & 17 Vict. c. 30, s. 9,

it is provided, that one of her majesty's principal secretaries of state, or a judge of one of the superior common law courts, may at his discretion issue a warrant or order for bringing up a prisoner confined in any gaol (except under process in a civil suit), before any judicature to be examined as a witness; and he shall be dealt with in the same manner as a prisoner brought up by *habeas corpus* is to be dealt with. And by 19 & 20 Vict. c. 108, s. 31, a similar power is given to the judge of a county court.

(*o*) This writ is still one by which a cause is removable from most of the inferior courts, although, under the present law of arrest, the operation of the writ will usually be confined to the proceedings. [See Reg. Gen. H. T. 1853 (Pr.), rr. 115–117; and as to the nature of the writ,

[able of common right without any motion in court (*m*), and it instantly supersedes all proceedings in the court below; but in order to prevent the surreptitious discharge of prisoners, it is ordered by statute 1 & 2 P. & M. c. 13, that no *habeas corpus* shall issue to remove any prisoner out of any gaol unless signed by some judge of the court out of which it is awarded; and to avoid vexatious delays, by removal of frivolous causes, it was enacted by 21 Jac. I. c. 23, that where the judge of an inferior court of record is a barrister of three years' standing, no cause shall (unless as there excepted) be removed from thence by *habeas corpus*, or other writ, after issue or demurrer joined.] It is also provided by 7 & 8 Geo. IV. c. 71, s. 6, that no cause under the value of 20*l.* (*n*), [shall be removed by *habeas corpus*, or otherwise, into any superior court, unless the defendant so removing the same, shall give special bail for payment of the debt and costs (*o*).] But by 8 & 9 Vict. c. 127, s. 21 (*p*), any suit instituted in a small debts court within the meaning of that Act, wherein the claim or demand shall exceed 10*l.*, shall be removable into any of the superior courts of law by leave of a judge thereof, on such terms as he shall order (*q*).

[But the most important species of *habeas corpus* is that of *habeas corpus ad subjiciendum*; which is the remedy used for the deliverance from illegal confinement (*r*). This

Bowerbank v. Walker, 2 Chit. 517;
Clack v. Dixon, 3 M. & S. 93;
Lawes v. Hutchinson, 5 Tyr. 236;
Doe v. Dring, 1 B. & C. 253;
Mitchell v. Mitchenham, ib. 513.]
 But a removal from a *district county court* takes place not by *habeas* but by *certiorari*, and only under the regulations contained in the enactments cited, post, p. 30, n. (*c*).

(*m*) *Penrice and Wynn's case*, 2 Mod. 306.

(*n*) This is an extension of the previous statutes of 12 Geo. I, c. 29, and 19 Geo. 3, c. 70, which fixed the

limit at 5*l.* and 10*l.* respectively.

(*o*) The bail must be put in within five days after the writ is allowed, otherwise the plaintiff may have a *procedendo*. See Reg. Gen. Hil. T. 1853 (Pr.), r. 116; *Blanchard v. De la Crouée*, 9 Q. B. 869.

(*p*) As to this Act, vide sup. vol. III. p. 396, n. (*l*).

(*q*) As to removal from the *Lord Mayor's Court of London*, see 20 & 21 Vict. c. clvii. sect. xvi. et seq.

(*r*) As to the writ of *habeas corpus ad subjiciendum*, &c., see *R. v. Greenhill*, 4 Ad. & El. 624; *Easton's case*,

[is directed to any person who detains another in custody; and commands him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum et recipiendum*,—to do, submit to, and receive whatsoever the judge or court awarding such writ, shall consider in that behalf(s). This is a high prerogative writ,] which existed at common law (*t*), though it has been improved, as we shall presently see, by statute. And it issues out of any of the superior courts at Westminster, including the Court of Chancery (*u*), not only in term time, but also during the vacation (*v*), and runs into all parts of the dominions of the Crown (*x*); [for the Queen is at all times entitled to have an account why the liberty of any of her subjects is restrained, whenever that restraint may be inflicted (*y*).] It has, however, been now recently enacted, by 25 & 26 Vict. c. 20, that no writ of habeas corpus shall issue out of England, by authority of any judge or court therein, into any colony or foreign dominion of the Crown where her Majesty has a lawfully established court, having authority to grant and issue such writ, and to ensure its due execution throughout such colony or dominion (*z*). [If this writ issues in vacation, it

12 Ad. & El. 645; *R. v. Batchelder*, 1 Per. & D. 516; S. C. nom. *Leonard Watson's case*, 9 Ad. & El. 731; *Ford v. Nassau*, 1 Dowl. N. S. 631; *In re Parker*, 5 Mee. & W. 32; *Jones v. Danvers*, *ibid.* 234; *Carus Wilson's case*, 7 Q. B. 984; *Queen v. Brennan*, 16 L. J. (Q. B.) 289; *In re Dunn*, 17 L. J. (Q. B.) 97; *Re Andrews*, 4 C. B. 226; *Re Anderson*, 30 L. J. (Q. B.) 129.

(*s*) *State Trials*, viii. 142.

(*t*) Bl. Com. vol. iii. p. 137.

(*u*) 31 Car. 2, c. 2, s. 10; 56 Geo. 3, c. 100, s. 2. The Lord Chancellor can issue the writ of *habeas corpus* at common law, in vacation. *Crowley's case*, 2 Swanst. 1.

(*v*) See *Wood's case*, 3 Wils. 172;

Leonard Watson's case, 9 Ad. & El. 731.

(*x*) As to *Jersey, Guernsey, &c.*, see *Carus Wilson's case*, 7 Q. B. 984; *Queen v. Brennan*, 16 L. J. (Q. B.) 289. As to the colonies, see *John Anderson's case*, 30 L. J. (Q. B.) 129.

(*y*) *Bourn's case*, Cro. Jac. 543.

(*z*) Shortly before the passing of this Act, the Court of Queen's Bench had issued such writ to the courts in Canada, requiring them to return the body of *John Anderson*, (a fugitive slave from an American slave state,) held by them in their custody, that he might be dealt with in this country. See *John Anderson's case*, *ubi sup.*

[is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon (*a*); unless the term should intervene, and then it may be returned in court (*b*).] It is necessary to apply for this writ, by motion to the court, or application to a judge, (as the case may be,) supported by affidavit of the facts (*c*). [For, as was argued by Lord Chief Justice Vaughan (*d*), “it is granted on motion, because it cannot be had of course; and therefore there is no *necessity* to grant it, for the court ought to be satisfied that the party hath a probable cause to be delivered.” And this seems the more reasonable, because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner (*e*). So that if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king’s service, a wife, a child, a relation, or a domestic confined for insanity, or other prudential reasons, might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court.]

And therefore Sir Edward Coke, when chief justice, did not scruple in the thirteenth year of James the first, to deny a *habeas corpus* to one confined by the Court of Admiralty for piracy; there appearing, upon his own showing, sufficient grounds to confine him (*f*). On the other hand, if a probable ground be shown that the party is imprisoned without just cause (*g*), and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which may not be denied;—but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by command of the king, privy council, or any other (*h*).

(*a*) *R. v. Clarke*, Burr. 606.

(*b*) *Ibid.* 460.

(*c*) *Hobhouse’s case*, 3 B. & Ald. 420.

(*d*) *Bushel’s case*, 2 Jon. 13.

(*e*) *Bourn’s case*, Cro. Jac. 543.

(*f*) *R. v. Marsh*, 3 Bulstr. 27; see also *White v. Wiltshire*, 2 Roll. Rep. 138.

(*g*) 2 Inst. 615.

(*h*) *Com. Journ.* 1 Apr. 1628.

[In a former part of these Commentaries, we expatiated at large on the personal liberty of the subject (i). This was shown to be a natural inherent right, which could not be surrendered or forfeited, unless by the commission of some great and atrocious crime; and which ought not to be abridged, in any case, without the special permission of law. A doctrine coeval with the first rudiments of the English constitution; and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest; asserted afterwards and confirmed by the Conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *Magna Charta*, and a long succession of statutes enacted under Edward the third. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful.

This it is which induces the absolute necessity of expressing upon every commitment, the reason for which it is made, that the court, upon a *habeas corpus*, may examine into its validity; and according to the circumstances of the case, may discharge, admit to bail, or remand, the prisoner.

And yet early in the reign of Charles the first, the Court of King's Bench, relying on some arbitrary precedents (and those; perhaps, misunderstood), determined that they could not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council (k). This drew on a

(i) Vide sup. vol. I. p. 149.

(k) State Trials, vii. 136.

[parliamentary inquiry, and produced the *Petition of Right*, in the third year of Charles the first, which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when in the following year Mr. Selden and others were committed by the lords of the council in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms, (including also the long vacation,) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for the good behaviour, which still protracted their imprisonment (l).]

The difficulties thus allowed to impede the application of the writ, [gave rise to the statute 16 Car. I. c. 10, s. 8; whereby it is enacted that if any person be committed by the king himself in person, or by the privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the Court of King's Bench or Common Pleas: who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing; or remanding such prisoner. Yet still in the case of Jenks, who in 1676 was committed by the king in council for a turbulent speech at Guildhall (m),] new impediments were permitted to delay the release of the party. im-

(l) Blackstone remarks (vol. iii. p. 134,) that Sir Nicholas Hyde, chief justice, also said on that occasion (see *State Trials*, vii. 240), "if they were again remanded for that cause, perhaps the court would not afterwards grant a *habeas corpus*, being already made acquainted with the cause of the imprison-

ment." He adds that this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of it, whose indignation was not cooled at the distance of four and twenty years. (See *Vindic. Mær. Claus.* edit. A.D. 1653.)

(m) *State Trials*, vii. 471.

soned (n); [the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, &c. whereby the prisoner was discharged at the Old Bailey (o). Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party; and many other vexatious shifts were practised to detain state prisoners in custody.] These abuses at length gave birth to [the famous *Habeas Corpus* Act, 31 Car. II. c. 2, which is frequently considered as another *Magna Charta* of the kingdom; and by consequence and analogy has also, in subsequent times, reduced the general method of proceeding on these writs, (though not within the reach of that statute, but issuing merely at the common law,) to the true standard of law and liberty (p).

The statute itself enacts, 1. That on complaint and request in writing by or on behalf of any person committed

(n) The expression of Blackstone is, that "new shifts and devices were made use of to prevent his enlargement by law." But there is perhaps no ground for imputing intentional oppression.

(o) See Crowley's case, 2 Symst. 1.

(p) Mr. Christian, in his edition of Blackstone, quotes from Burnet's Hist. Car. II., a circumstance respecting the *Habeas Corpus* Act, which is more curious than creditable; and though we cannot be induced to suppose that this important statute was obtained by a jest and a fraud, yet the story proves that a very formidable opposition was made to it at that time. "It was carried"

(says the Bishop, vol. i. p. 485) "by an odd artifice in the House of Lords. Lord Grey and Lord Norris were named to be the tellers; Lord Norris, being a man subject to vapours, was not at all times attentive to what he was doing, so a very fat lord coming in, Lord Grey counted him for ten as a jest at first, but seeing Lord Norris had not observed it, he went on with his mis-reckoning of ten; so it was reported to the House, and declared that they who were for the bill, were the majority; though it indeed went on the other side; and by this means the bill passed."

[and charged with any *crime*,—unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit-treason or felony; or upon suspicion of such petit-treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process,—the lord chancellor or any of the judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges. And upon the return made, shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature (*g*). 2. That such writs shall be indorsed, as granted in pursuance of this Act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner bought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That any officer or keeper neglecting to make due returns, or not delivering to the prisoner or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority, (specified in the Act,) shall for the first offence forfeit 100*l.*, and for the second offence 200*l.*, to the party grieved, and be disabled to hold his office (*r*). 5. That no person, once delivered by *habeas corpus*, shall be recommitted for the same offence, on penalty of 500*l.* 6. That every person committed for treason or felony, shall, if he requires it, the first week of the next Term, or the first day of the next

(*g*) Where the writ issues in vacation, returnable immediately before a judge at chambers, it does not expire by the commencement of the Term. (*Rex v. Shebbeare*, 1 Burr. 460.)

(*r*) A person, sent over from Ireland under a warrant from the

secretary of state from Ireland, charged with any offence, and committed to prison until he can be brought before a judge, is entitled to a copy of the warrant, under the *Habeas Corpus* Act, after it has been demanded. (*Sedley v. Arbouin*, 3 Esp. 194.)

[session of *oyer* and *terminer*, be indicted in that Term or session, or else admitted to bail—unless the witnesses for the Crown cannot be produced at that time. And that if acquitted, or if not indicted and tried in the second Term or session, he shall be discharged from his imprisonment for such imputed offence. But that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended; but shall be left to the justice of the judges of assizes. 7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the Chancery or Exchequer, as out of the Queen's Bench, or Common Pleas; and the lord chancellor or judges denying the same, on sight of the warrant, or upon oath made that the same is refused, shall forfeit severally to the party grieved, the sum of 500*l*. 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey (*s*). 9. That no inhabitant of England, Wales, or Berwick, (except persons contracting, or convicts praying, to be transported, or having committed some capital offence in the place to which they are sent,) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions; on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party grieved, a sum not less than 500*l*.; shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire*; and shall be incapable of the king's pardon.

This is the substance of this great and important statute: which extends (we may observe) only to the case of commitments for such criminal charges as can produce no inconvenience to public justice, by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left,] by that statute, [to the *habeas corpus* at common

(*s*) See *Carus Wilson's case*, 7 Q. B. 984; *The Queen v. Brennan*, 16 L. J., Q. B. 289.

[law(r).] But to render the remedy more effectual, even in those cases, than it was at common law, it has been since provided by 56 Geo. III. c. 100—1. That where any person shall be restrained of his liberty, (other than for some criminal or supposed criminal matter, and except persons imprisoned for debt, or by process in any civil suit,) any of the barons of the exchequer of the degree of the *coif*, or any of the justices of either bench, shall upon *affidavit* showing a probable and reasonable ground for such complaint, award in vacation time a writ of *habeas corpus*, under the seal of the court whereof he is a judge, and directed to the person in whose custody the party is confined; which shall be returnable immediately before himself, or any other judge of the court. 2. That upon disobedience to the writ, the judge before whom it is returnable may issue a warrant to arrest the party guilty of such contempt. 3. That if the writ should be awarded so late in vacation that it cannot be conveniently obeyed during vacation, the same may be made returnable in the court to which the judge by whom it is awarded belongs, on a certain day in the next Term. 4. That if such writ shall be awarded by the Court itself of Queen's Bench, Common Pleas, or Exchequer, so late that it cannot be conveniently obeyed during the Term, the same may be made returnable in the then next vacation before any of the judges. 5. That though the return to the writ may be good in law, it shall be lawful for the judge before whom it is returnable, to proceed to examine into the truth of the facts—and if it appears doubtful to him whether they be true or not, it shall be lawful for such judge to let to bail the person so confined, upon his entering into a recognizance to appear in the court to which the judge belongs in the Term follow-

(r) "Even upon writs of *habeas corpus* at the common law," says Blackstone (vol. iii. p. 137), "it is now expected by the court, agreeable to antient precedents and the spirit of the Act of par-

liament, that the writ should be immediately obeyed, without waiting for any *alias* or *pluries*; otherwise an attachment will issue." And see *R. v. Cowle*, 2 Burr. 586.

ing; which court may proceed to examine into the truth of the facts in a summary way by *affidavit*, and to order and determine as to the discharge, bailing, or remanding of the party. 6. That the like proceeding for controverting the truth of the return may be had in the case where the writ shall be awarded by the court itself, or be returnable therein. 7. That the several provisions aforesaid shall extend to all writs of *habeas corpus*, awarded in pursuance of the Act of the thirty-first year of Charles the second. Lastly, that the *habeas corpus* according to this Act of 56 Geo. III. c. 100, may run into any county palatine or cinque port, or other privileged place; or to the Islands of Jersey, Guernsey, and Man(s); or to any port, harbour, road, creek, or bay, upon the coast of England or Wales, lying out of the body of any county.

By which admirable regulations the remedy seems now to be complete for removing the injury of illegal confinement, [a remedy the more necessary,] says Blackstone(*t*), [because the oppression does not always arise from the ill nature, but sometimes from the mere inattention of government. For it frequently happens in foreign countries, (and has happened in England during the temporary suspension of the statute,) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.]

VI. The writ of *Certiorari*. This issues out of the Court of Chancery, or a superior court of the common law(*u*), directed in the queen's name to the judges or officers of inferior courts of record(*v*), commanding them to return the record of a cause depending before them, to the end the party may have the more sure and speedy justice. This writ may be had either in criminal or civil cases. For

(*s*) See *Carus Wilson's case*, 7 Q. B. 984; *The Queen v. Brennan*, 16 L. J., Q. B. 289.

(*t*) 3 Bl. Com. p. 138.

(*u*) As to the Court of Exche-

quer, see *In re Allison*, 10 Exch. 561.

(*v*) Bac. Abr. *Certiorari* A. As to courts not of record, see *Ex parte Phillips*, 2 Ad. & El. 586.

in the former, the Queen's Bench has a superintendence over all inferior courts, and may remove the indictments or other proceedings therein depending, and transfer them to its own jurisdiction. But the consideration of this use of the writ, belongs more properly to a subsequent division of these Commentaries (*x*): and our attention is at present called to its application in civil cases only. Its object here, is similar in general to that of the *habeas corpus cum causâ*—that is, to obtain relief from some inconvenience supposed, in the particular case, to arise from a cause being disposed of before an inferior jurisdiction, less capable than the superior court of rendering complete and effectual justice (*y*).

There is, however, this distinction between these two writs; viz., that a *certiorari* affects the proceedings only (*z*),—while by the *habeas corpus cum causâ*, the person of the defendant, if in custody, is (as we have seen) capable of being removed, as well as the proceedings, from the court below. So that where an arrest of the defendant has taken place in that court, it has been usual to resort to a *habeas corpus*, rather than a *certiorari* (*a*). The provisions before cited (*b*) from the Acts 21 Jac. I. c. 23; 7 & 8 Geo. IV. c. 71; and 8 & 9 Vict. c. 127, regulating the removal of causes by the writ of *habeas corpus* to the superior courts, apply equally to the writ now in question: and the Acts relative to the District County Courts established under 9 & 10 Vict. c. 95, enact that from those courts causes shall be removed by *certiorari* only, and under the regulations therein contained (*c*).

(*x*) Vide post, bk. vi. c. xix.

(*b*) Vide sup. p. 20.

(*y*) As to the practice in the superior courts, in causes removed from the inferior, see Reg. Gen. H. T. 1853 (Pr.), rr. 115—117.

(*c*) See 9 & 10 Vict. c. 95, s. 90; 13 & 14 Vict. c. 61, s. 16; 19 & 20 Vict. c. 108, ss. 38, 40—42, 44, 49, 67, 71; 23 & 24 Vict. c. 126, s. 22. As to the District County Courts, vide sup. vol. III. p. 396 et seq.

(*z*) See *Doe v. Dring*, 1 B. & C. 253.

(*a*) Vide sup. p. 19, n. (*o*).

CHAPTER XIII.

OF INJURIES COGNIZABLE IN THE COURTS OF
EQUITY—WITH THEIR REMEDIES.

BEFORE we enter on the subject of the ensuing chapter, viz. the injuries cognizable in the courts of equity, with their appropriate remedies (*a*), it will be proper to recollect the observations made in a former part of this work on the nature of equity (*b*). Its nature has been there generally explained, and it has been shown to constitute a large and important portion of our juridical system—distinct from and suppletory to the common law, and administered in its own peculiar courts. But it may be important now to enter into some further particulars, tending to throw more distinct light on this subject.

[The very terms of a court of *equity*, and a court of *law*, as contrasted with each other, are apt to confound and mislead us; as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which would draw a line between the two jurisdictions, by setting law and equity in opposition to each other,—will be found either totally erroneous, or erroneous to a certain degree.

1. Thus, in the first place, it is said (*c*), that it is the business of a court of equity, in England, to abate the rigour of the common law.] And in fact there have been some few instances, of its exercising this kind of interposition. But, in general, it contends for no such power. [Hard was the case of bond creditors, whose debtor de-

(*a*) Vide sup. vol. III. p. 472.

(*c*) Lord Kaims, Prin. of Eq. 44.

(*b*) Vide sup. vol. I. p. 82.

[vised away his real estate. Rigorous and unjust the rule which put the devisee in a better position than the heir(*d*). Yet a court of equity had no power to interpose.] Hard also were the rules of the common law (so lately subsisting), [that land descended or devised should not be liable to the simple contract debts of the ancestor or devisor(*e*)—although the money was laid out in purchasing the very land: that the father should never immediately succeed as heir to the real estate of his son(*f*):] and that lands should descend [to a remote relation of the whole blood, (or even escheat to the lord,)—in preference to the owner's half-brother(*g*).] And yet no relief from any of these severities,—though the artificial reasons for them, arising from feudal principles, had long ago entirely ceased,—could ever be afforded by a court of equity; and it is to the legislature alone, that we owe our deliverance from them(*h*). [In all such cases of positive law, the courts of equity, as well as the courts of law, must say with Ulpian, “*Hoc quidem perquam durum est, sed ita lex scripta est*”(*i*).]

2. Again: it [is said that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter(*k*). But so also does a court of law. Both, for instance, are equally bound and equally profess to interpret statutes according to the true intent of the legislature. In general law, all cases cannot be foreseen; or, if foreseen, cannot be expressed: some will arise

(*d*) Vide sup. vol. i. pp. 434, 436.

(*e*) Ibid. p. 435.

(*f*) Ibid. p. 412.

(*g*) Ibid. p. 424.

(*h*) To these instances Blackstone (vol. iii. p. 430.) adds the case of *parol demurrer*; a practice according to which an infant,—when made defendant in some real actions, or in an action of debt brought against him as heir to a deceased ancestor,

—might formerly pray that the parol might demur, viz. that the pleadings might be stayed till he should attain his full age. Against this also, no relief could be afforded by equity; but the practice itself was abolished by 11 Geo. 4 & 1 Will. 4, c. 47, §. 10.

(*i*) Ff. 40, 9, 12.

(*k*) Lord Kaims, Prin. of Equity, 177.

[that will fall within the meaning, though not within the words of the legislature; and others, which may fall within the letter, may be contrary to its meaning, though not expressly excepted.] In reference to such considerations as these, a case, (as we elsewhere had occasion to remark,) is sometimes said to fall within the *equity*,—or, at other times, to be *out of the equity*,—of an act of parliament (*l*). But [here by equity, we mean nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective. These, then, are the cases which, as Grotius says, “*lex non exactè definit, sed arbitrio boni viri permittit* (*m*),” in order to find out the true sense and meaning of the lawgiver from every other topic of construction. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges, in the courts both of law and equity; the construction must in both be the same; or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavours to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense, in a single tittle.]

3. But, [it hath been said, that *fraud*, and *accident*, and *trust*, are the proper and peculiar objects of a court of equity (*n*). But every kind of *fraud* is equally cognizable, and equally adverted to, in a court of law.] In like manner [many *accidents* are also supplied in a court of law;—as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths, (which make it impossible to perform a condition literally,) and a multitude of other contingencies: and many cannot be relieved, even in a court of equity;] as the accident of [a devise ill executed,] or a power of leasing omitted in a family settlement. [A technical *trust*, indeed, created in land by the limitation of a second use, was

(*l*) Vide sup. vol. i. p. 75.

(*m*) De *Æquit.* a. 3.

(*n*) 1 Roll. Abr. 374; 4 Inst.

84; Earl of Bath v. Sherwin, 10 Mod.1.

[forced into the courts of equity in the manner formerly mentioned (*o*); and this species of trust has ever since remained as a kind of *peculium* in those courts; which also exercise, in general, an exclusive jurisdiction over trusts of *personal* property. But there are some trusts which are cognizable in a court of law, as deposits and all manner of bailments (*p*); and especially that implied contract (so highly beneficial and useful) of having undertaken to account for money received to another's use.

4. Once more: it hath been said that a court of equity is not bound by rules or precedents; but acts from the opinion of the judge, founded on the circumstances of every particular case (*q*); whereas, in truth, the system of our courts of equity is a laboured connected system, governed by established rules; and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus the refusing a wife her dower in a trust estate, and yet allowing the husband his curtesy (*r*);] —which was formerly the rule in equity, though such estate is now made subject by statute to the former as well as to the latter incident (*s*);—and [the distinguishing between a mortgage at *five per cent.*, with a clause of reduction to *four* if the interest be regularly paid, and a mortgage at *four per cent.*, with a clause of enlargement to *five* if the payment of the interest be deferred: so that the former shall be deemed a conscien-

(*o*) Vide sup. vol. i. p. 375.

(*p*) Vide sup. vol. ii. p. 79.

(*q*) This is stated by Mr. Selden (Table Talk, tit. Equity), with more pleasantry than truth: "For law we have a measure, and know what to trust to; equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. It is all one, as if they should make the standard

for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience."

(*r*) Vide sup. vol. i. p. 380; and see *Milner v. Colmer*, 2 P. Wms. 640.

(*s*) 3 & 4 Will. 4, c. 105.

[tious, the latter an unrighteous bargain (*t*):—both these and other cases that might be instanced, are plainly rules of positive law; which have been supported only by the reverence shown, (and generally very properly shown,) to a series of former determinations, in order that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed in the courts of equity, that a particular judgment, founded upon special circumstances, gives rise to a general rule (*u*).]

It is true that the notion just mentioned, of the character, power and practice of a court of equity, was [formerly adopted and propagated (though not with approbation of the thing), by our principal antiquaries and lawyers,—by Spelman, Coke, Lambard and Selden, and even the great Bacon himself (*x*). But this was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves,—partly from their ignorance of law (being frequently bishops or statesmen), partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the courts of law,—had arrogated to themselves such unlimited authority, as hath been totally disclaimed by their successors,] since the close of the seventeenth century. [The decrees of a court of equity, were then rather in the nature of awards, formed on the sudden, *pro re natá*, with more probity of intention than knowledge of the subject,—founded on no settled principles, as being never designed and therefore never used as precedents.] But the systems of jurisprudence in our courts both of law and equity, are now equally fixed or positive systems; though [varied by different usages in the forms and mode of their proceedings; the one being originally derived,

(*t*) See *Holles v. Wyse*, 2 Vern. the undisposed residuum of personal estates. 289; *Sirode v. Parker*, *ibid.* 316; *Nicholls v. Maynard*, 3 Atk. 520.

(*x*) See *Archeion*, 71, 72, 73;

(*u*) See the case of *Foster and Munt*, 1 Vern. 473, with regard to De Augm. Scient. l. 8, c. 3; Table Talk, tit. Equity; Gloss. 108.

[(though much reformed and improved,) from the feudal customs as they prevailed in different ages in the Saxon and Norman judicatures (*y*); the other, (but with equal improvements,) from the imperial and pontifical formularies introduced by their clerical chancellors.]

Subject to this difference in the form of procedure, these systems are also in strict accordance with each other, as to the *principles* on which they proceed; the maxim generally applicable to the subject being, that *equity follows the law*. Some few instances indeed exist,—where a manifestly harsh and unreasonable rule having been maintained in the common law courts, owing to a want of proper liberality and expansion in the views of the judges, relief has been afforded from it in the courts of equity. [Thus the penalty of a bond, originally contrived to evade the absurdity of those monkish constitutions which prohibited taking interest for money, was therefore very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan, with interest; for the judges could not, as the law then stood, give judgment that the interest should be specifically paid. But when afterwards the taking of interest became legal, as the necessary companion of commerce (*z*),—nay, after the statute of 37 Hen. VIII. c. 9, had declared the debt or loan itself to be “the just and true intent” for which the obligation was given, their narrowminded successors still adhered wilfully and technically to the letter of the antient precedents; and refused to consider the payment of principal, interest and costs as a full satisfaction of the bond. At the same time more liberal men, who sat in the courts of equity, construed the instrument according to its “just and true intent,” as merely a security for the loan; in which light it was certainly understood by the parties; at least after these determinations; and therefore this construction should have been universally received. So, in mortgages, being only a landed, as the other is a personal,

(*y*) Vide sup. vol. I. p. 45.

(*z*) Vide sup. vol. II. p. 88.

[security for the money lent, the payment of principal, interest and costs ought at any time, before judgment executed, to have saved the forfeiture in a court of law, as well as in a court of equity. And the inconvenience, as well as injustice, of putting different constructions in different courts, upon one and the same transaction, obliged the parliament at length to interfere; and to direct, by the statutes 4 Anne, c. 16, and 7 Geo. II. c. 20, that, in cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be universally followed in the courts of law, wherein it had before these statutes in some degree obtained a footing (a).]

But notwithstanding these particular exceptions, the maxim that equity follows the law, has been long fully recognized; so that the rules of property, the rules of evidence, and the rules of interpretation, are, or ought to be, the same under both systems. Thus [neither a court of equity, nor of law, can vary men's wills or agreements; or, (in other words,) make wills or agreements for them. Both are to understand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages,—as a rent of 5*l.* an acre for ploughing up ancient meadow (b); nor against a lapse of time, where the time is material to the contract,—as in covenants for renewal of leases. Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or agreement.] And upon the same principle, [where the subject-matter is such as requires to be determined *secundum æquum et bonum*, as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In

(a) See *Stern v. Vanburgh*, 2 Keb. 553, 555; *Elliott v. Callow*, Salk. 597; *Anonym.* 6 Mod. 11; *Burridge*

v. Fortescue, ib. 60; *Ireland's case*, ib. 101.

(b) *Aylett v. Dodd*, 2 Atk. 236.

[matters of positive right, both courts must submit to and follow those antient and invariable maxims, "*quæ relictæ sunt et tradita*" (b). Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question depends upon that law; as in the case of the privileges of ambassadors. In mercantile transactions, they both follow the marine law, and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper *forum*; in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject (c); and if a question came before either, which was properly the object of a foreign municipal law, they would both receive information as to what is the rule of the country, and would both decide accordingly (d).

Such, then, being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the difference of the subjects over which they exercise jurisdiction; in the kind of relief they administer; and the method of proceeding they observe (e).

I. And, first, as to the subjects of jurisdiction. The jurisdiction in equity having been originally introduced, as elsewhere shown, to mitigate certain severities and to supply certain defects, existing in the common law (f), and from which relief could not otherwise be obtained, such jurisdiction is consequently to be considered as in the nature of a supplement only, (however valuable and extensive,) to the proper and antient scheme of judicature. There are accordingly many subjects which, having been

(b) "*De jure naturæ, cogitare per nos atque dicere debemus; de jure populi Romani, quæ relictæ sunt et tradita.*"—Cic. de Leg. 1, 3, ad calc.

(c) Vide sup. vol. 11. p. 209.

(d) See Phil. on Ev. vol. ii. p. 144.

(e) See Wykham v. Wykham, 18 Ves. jun. 415; Clarke v. Patner, 19 Ves. jun. 21, 22.

(f) Vide sup. vol. 1. p. 82.

always sufficiently provided for by the common law, remain under its exclusive cognizance, undisturbed by any interference of the courts of equity; some few, on the other hand, of which no notice has ever been taken by the courts of law, and which are therefore exclusively dealt with by the courts of equity; and many others over which the two jurisdictions hold a sort of *divisum imperium*, justice being administered to the suitor at common law, in reference to those subjects,—but in a limited or imperfect manner, and so as to require the occasional interposition of a court of equity, in order to insure to the suitor the full means and measure of redress (*g*). Of the first class of subjects it will be sufficient to say in general, that it comprises all those not falling under the second and third. To the second class belong the right of redemption in a forfeited mortgage, and the beneficiary interest under a trust (*h*); to the third, the subjects of accounts, partnerships, and agreements, with many others, of which a distinct idea cannot well be obtained without consulting the treatises on Chancery Practice (*i*). Of this class of subjects, however, it may be in general observed, that, though all in some measure belonging in common to the co-ordinate jurisdiction of law and equity, they are in some instances distributed between them in very unequal shares. Thus, though the subject of *agreement* may be said to be indifferently appropriate to either forum, the dominion over *accounts*, and by consequence over *partnerships* also, is almost entirely engrossed by the courts of equity.

II. As to the kinds of relief. We shall here particularly notice four kinds of relief which are afforded by a.

(*g*) It is to be observed, however, that a plaintiff is not allowed to sue both at law and in equity for the same thing; if he does, the court of equity will put him to his election; though an exception to this is admitted in the case of a mortgagee, who is entitled to proceed both in

law and equity. [See Dan. Pr. (3rd edit.), p. 654; Smith's Pr. (6th edit.), p. 777.]

(*h*) Vide sup. vol. i. p. 375.

(*i*) See particularly Daniell's Pract. of the Court of Chancery (3rd edit.), by Headlam.

court of equity, namely, 1st, where it protects and enforces the execution of trusts; 2ndly, where it enforces the specific performance of contracts; 3rdly, where it grants an injunction; 4thly, where it lends its aid to perpetuate testimony.

1st. The origin and nature of *trusts* have been stated under a former division of this work (*h*). In the present place we have further to remark, that for their protection and enforcement, no means are in general afforded by the courts of common law; but that proceedings may be taken in equity, praying such relief from the court as the circumstances of the case require; such as that of compelling the trustee to account for trust money received; or compelling the sale of the trust property, and a due application of the proceeds under the direction of the court; or setting aside dispositions of trust property made in breach of trust, and with knowledge of the trust, on the part of the purchaser as well as the trustee; or appointing new trustees, either in substitution for or in addition to the existing ones.

In connection with the subject of trusts, may be also noticed the proceedings in a court of equity, for the *administration of assets* (*l*): involving the payment of debts and legacies; and the distribution of residues, out of the estates, (whether legal or equitable,) of deceased persons; and the passing of the accounts of such estates;—under the authority of the court. Such proceedings may be in-

(*k*) Vide sup. vol. i. p. 360 et seq.

(*l*) The nature of *assets* was explained, sup. vol. i. pp. 433–436; vol. ii. p. 213. The word *assets*, however, is sometimes applied more generally, and expresses any distributive estate, whether the owner is a deceased person or not. It may be convenient to remark here, upon the doctrine of courts of equity which is called the *marshalling of assets*. If a distributive estate comprises two funds, and has to satisfy

two sets of claimants,—and one set are at law entitled to resort to either fund, and the other to one of them only,—and the former set so far exhaust the fund to which the latter set have a right to resort, that it becomes insufficient to pay them,—they will in some cases be entitled in equity, to be paid *pro tanto* out of the other fund; in which case the assets are said to be marshalled in their favour. As to the learning on this subject, see Spence, Eq. Jur. vol. ii. 826; Ram on Assets, chap. xxviii.

stituted either by a creditor, legatee, or next of kin; or even by the personal representative himself, when disinclined to undertake the responsibility of administering the assets (*m*). They are proceedings wholly foreign to the jurisdiction of the superior courts of the common law (*n*): which tribunals simply give effect to the claim of the particular creditor who sues there, to be paid out of such assets as a court of common law can notice, without ever undertaking a general distribution even of assets of this description; and entertain no claim for a distributive share of residue, nor (in general) for a legacy (*o*).

The legislature has recently been very active in its provisions on the subject of trusts. Among them, the following seem to require some notice in this place.

By 22 & 23 Vict. c. 35, s. 26 (*p*), no trustee, executor, or administrator making any payment, or doing any act *bonâ fide* under a power of attorney, shall be liable for what is so done, by reason that the person who gave the power

(*m*) See 15 & 16 Vict. c. 86, ss. 45—47; Consol. Gen. Ord. (1860), vii. 1. 1. By 22 & 23 Vict. c. 35, s. 29, the personal representative may even, without reference to the Court of Chancery, ascertain the outstanding debts and liabilities by notices of a proper kind in the newspapers; and at the expiration of the time named in such notices proceed to distribute among the parties entitled, and of whose claims he has been apprised. See also sect. 30, and 23 & 24 Vict. c. 38, s. 9.

(*n*) It will be recollected, however, that a distributive share under an intestacy, or a legacy under a will, may be now recovered in a *county court*, where the amount does not exceed 50*l*. Vide sup. vol. II. p. 229 n.

(*o*) The only case in which an action for a legacy seems maintainable in a superior court of common law,

for a legacy, is where a chattel has been specifically bequeathed, and the bequest assented to by the executor. See *Doe v. Guy*, 3 East, 123; 2 Saund. by Wms. 137 (c), 6th edit.

(*p*) Antecedently to this Act, the following statutes had been passed for relief of trustees; the enlargement of their powers; and the removal of inconvenience, arising from their disability to act in certain cases:—43 Geo. 3, c. 75; 59 Geo. 3, c. 80, s. 2; 6 Geo. 4, c. 74; 9 Geo. 4, c. 78; 11 Geo. 4 & 1 Will. 4, c. 65; 3 & 4 Will. 4, c. 74, ss. 33, 91; 8 & 9 Vict. c. 97, s. 3; c. 118, ss. 20, 137; 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74; 13 & 14 Vict. c. 35, ss. 19—25; c. 60; 15 & 16 Vict. c. 55; 16 & 17 Vict. c. 70, s. 108, et seq.; 18 & 19 Vict. c. 13; c. 91, s. 10; 19 & 20 Vict. c. 120, ss. 17, 36.

was dead at the time of such payment or act, or had done some act to avoid the power.

By the same Act, sect. 30, and 23 & 24 Vict. c. 38, s. 9, any trustee, executor, or administrator may apply to a judge of the Court of Chancery at chambers, for his opinion or direction respecting the management or administration of the trust property or the assets (*q*); and by acting on such opinion or direction, shall be deemed, so far as regards his own responsibility, to have discharged his duty.

By the same Act of 22 & 23 Vict. c. 35, s. 31, every instrument creating a trust, either expressly or by implication, shall be deemed to contain a clause to the effect following, viz. that the trustees or trustee shall be chargeable only for what they shall respectively actually receive, notwithstanding their signature of any receipt for the sake of conformity, and shall be answerable only for their own acts and neglects, and not for those of each other, nor for any person with whom any trust fund may be deposited, nor for any deficiency of any securities, unless through their own wilful default; and also that it shall be lawful for them to reimburse themselves out of the trust premises, all expenses incurred in the execution of the trusts.

By 23 & 24 Vict. c. 145, ss. 1—7 (*r*), it is provided that in all cases where, by any instrument of settlement, it is expressly declared that trustees or other persons therein indicated shall have a power of sale over any hereditaments, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale, by selling such hereditaments, either together or in lots, and either by auction or private contract.

(*q*) See Ord. of Chancery, 20th March, 1860, as to the practice under this provision.

(*r*) The provisions in this Act (except as therein otherwise pro-

vided) extend only to persons entitled or acting, under an instrument executed after the passing of the Act, viz. 28th August, 1860.

By the same Act, sect. 25, it is provided that trustees, with trust money in their hands, which it is their duty to invest at interest, may, in their discretion, invest the same in any of the parliamentary stocks or public funds, or in government securities (s); provided that no investment shall be made except in the £3 per cent. consols, where there is a person under no disability, entitled in possession to receive the income during life (or for a term determinable with life), or for any greater estate, without his consent in writing (t). And this Act also contains provisions (sect. 26) authorizing trustees to provide, out of the trust funds, for the maintenance or education of infant cestuis que trusts;—and (sect. 27) for the appointment of new trustees in the event of any trustee or trustees dying or becoming unfit to act, or being desirous to be discharged from acting;—and also (sect. 29) making the receipts in writing of any trustees, for money payable to them as trustees, sufficient discharges, and effectually exonerating the party paying, without his being required to see to the application thereof (u).

By 24 & 25 Vict. c. 96, provisions are made against

(s) By a previous enactment (22 & 23 Vict. c. 35, s. 32,) a trustee, executor or administrator, not expressly forbidden by some instrument creating his trust, to invest the funds on real securities in any part of the United Kingdom, or in Bank or East Indian stock, may so invest them and shall not be held liable for a breach of trust, provided the investment in other respects be reasonable and proper.

(t) By 23 & 24 Vict. c. 38, ss. 10, 11, the Lord Chancellor was empowered (with the assistance of the other equity judges) to make orders from time to time as to the investment of cash under the control of the Court of Chancery; and it was enacted, that it should be lawful for

trustees, executors and administrators having power to invest their trust funds on government securities or upon parliamentary stocks, funds, or securities, to invest their trust funds in the same way. And, accordingly, an order issued 1st February, 1861, under which cash in the control of the court may be invested in, 1. The consols, £3 per cent. annuities. 2. Reduced £3 per cent. annuities. 3. New £3 per cent. annuities. 4. Bank stock. 5. East India stock. 6. Exchequer bills. 7. £2:10s. per cent. annuities. 8. On mortgage of freehold or copyhold estate in England or Wales.

(u) See also the previous enactment of 22 & 23 Vict. c. 35, s. 23.

the fraudulent conversion of trust funds by the trustees; but this belongs to a later part of the volume (*u*).

Lastly, by 25 & 26 Vict. c. 108, s. 2, it is provided that every trustee and other person authorized to dispose of land by way of sale, exchange, partition, or enfranchisement, may, unless forbidden by the instrument creating the trust or power, so dispose thereof, with an exception or reservation of any minerals, or may dispose of the minerals separately from the residue of the land; but such disposition must be sanctioned by the Court of Chancery, to be obtained on petition in a summary way.

2ndly. The Court of Chancery has long exercised the jurisdiction of *decreeing the specific performance of agreements*, instead of giving redress for their non-performance by way of damages (*v*). And hence a fiction is established in equity, [that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally.] This mode of relief, indeed, is confined, generally speaking, to contracts of lands, it not being the ordinary practice of courts of equity to enforce the specific performance of agreements relating to personalty; for the breach of those may in general be adequately redressed by an action at law (*w*). But contracts for the purchase of land or the like will be decreed to be specifically performed (*x*); and here the application of the doctrine above referred to, which considers as actually done that which ought to have been done, gives birth to nearly all the same consequences in equity, as would follow at law from a conveyance actually made to the vendee at

(*u*) Vide post, bk. vi. chap. v.

541.

(*v*) This practice of the Court of Chancery, has been traced to the time of Edward the fourth. (1 Mad. Chan. p. 361.)

(*w*) As to specific performance of contracts, see *Mortlock v. Buller*, 10 Ves. jun. 315; 1 Mad. Chan. 402; *Claringbould v. Curtis*, 21 L. J. Ch.

(*x*) In addition to, or in substitution for, the decree for specific performance, the Court of Chancery may now by 21 & 22 Vict. c. 27, award *damages* to the party injured; which, antecedently to that provision, such court had no power to award.

the time specified in the contract. Thus, though the legal estate remains in the vendor till the conveyance is completely executed, the vendor is in equity considered as having been *trustee* for the vendee from the time specified in the contract; and the vendee, on the other hand, as a trustee for the vendor from the same period, so far as the purchase-money is concerned. With respect to the specific performance of an agreement it is to be remarked, that no decree or order for it, can be obtained from a court of law, though damages for the breach of it will be awarded there (*y*).

3rdly. With respect to an *injunction*;—this may be obtained from a court of equity, in a variety of cases, to restrain the adverse party in the suit from committing any acts in violation of the plaintiff's rights (*z*): as, particularly, to restrain him from infringing a patent or copyright; or from committing waste or nuisance. It may also be obtained to restrain a party from proceeding with an action, or from enforcing a judgment he has recovered (*a*); and in some instances of an urgent nature,

(*y*) A court of law, however, may now, in certain cases, and as incidental to an action, grant a *mandamus* to compel the defendant to perform a duty in which the plaintiff is interested, vide sup. p. 9.

(*z*) By 5 Vict. c. 5, ss. 4, 5, the Court of Chancery may, on motion or petition in a summary way, without bill filed, restrain the Bank of England or other public company from permitting a transfer of stock or shares, or from paying any dividend. And by The Consol. Gen. Ord. (Feb. 1860) xxvii, the mode of proceeding by writ of *distringas* on stock under that statute, is regulated.

(*a*) The practice with respect to injunctions to stay proceedings at law, (formerly called *com. non in-*

junctions), differed at one period, in some respects, from the practice with respect to injunctions to prevent waste or the like, (then called *special injunctions*). But by 15 & 16 Vict. c. 86, s. 58, it is now provided, that the practice as to the former, shall for the future be assimilated to the practice as to the latter, so far as the nature of the case will permit. As to the present practice on injunctions, see Consol. Gen. Ord. (1860) xxv. It may be here observed, that by 21 & 22 Vict. c. 27, the Court of Chancery is, for the first time, enabled to award *damages* to the party injured, in addition to, or in substitution for, an injunction.

(if the case be supported by a proper affidavit,) may be obtained immediately upon the institution of the suit, and without any previous notice to the opposite party (c). In the course of an action, an injunction may now also be granted, as the reader will recollect, by a court of law; but it is by the effect of a very recent alteration of our system (d).

4thly. As to the *perpetuation of testimony*. The examination of witnesses never takes place at common law, except in reference to matters in respect of which some action or legal proceeding has been already commenced. But it is sometimes very material for the protection of existing rights, that the evidence relating to them should be taken and preserved, though they may not yet be the subject of any suit,—the position of the parties interested being such as not yet to afford any occasion or opportunity for litigation; for there may be reason, nevertheless, to expect a future legal contest of the right, and that at a period when the witnesses, now competent to give material evidence upon it, may have been removed by death. In such cases, therefore, a court of equity lends its aid by permitting any of the parties interested, to institute proceedings against the rest, with a view to the mere perpetuation of the testimony, and without reference to any other present relief. And this is effected by taking down, as in an ordinary cause, the examinations or depositions of the witnesses,—which in the event of the right being tried at any future period, when the attendance of the witnesses can no longer be procured, may be received in evidence between the

(c) 1 Mad. Chan. 126. By 15 & 16 Vict. c. 76, s. 226, it is provided, that in case any action, suit, or proceeding, shall be commenced or prosecuted in disobedience to any injunction, the court in which it is so commenced or prosecuted, shall, on production of the writ of injunction, stay all further proceedings in such

court; and this without prejudice to the liability of the person, so violating the injunction, to punishment for the contempt.

(d) 17 & 18 Vict. c. 125, ss. 79—82; sup. vol. III. p. 484. And see also 15 & 16 Vict. c. 83, s. 42, in reference to infringement of a patent (sup. vol. II. p. 32).

same parties or those claiming under them (e). And with a view to extend the application of so convenient and important a remedy, it is now lately enacted by the 5 & 6 Vict. c. 69, that any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity or office; or to any estate or interest in any property real or personal; the right or claim to which cannot by him be brought to trial before the happening of such event,—shall be entitled to file a bill in the High Court of Chancery, to perpetuate any testimony which may be material for establishing such claim or right (f).

These are the principal, (for we must pass by the minuter points,) of the jurisdiction at present exercised in our courts of equity: [which differs, we see, very considerably from the notions entertained by strangers, and even by those courts themselves before they arrived at maturity; as appears from the principles laid down, and the jealousies entertained of their abuse, by our early juridical writers cited in a former page (g); and which were received and handed down by subsequent compilers, without attending to those gradual accessions and derelictions by which in the course of a century, this mighty river had imperceptibly shifted its channel. Lambard, in particular, in the reign of Queen Elizabeth, lays it down (h), that “equity should not be appealed unto but only in rare and “extraordinary matters; and that a good chancellor will

(e) This is most frequent when lands are devised by will, away from the heir at law: and the devisee institutes a suit to perpetuate the testimony of the witnesses to the will. This is what is usually meant by *proving a will in Chancery*. (3 Bl. Com. 450.)

(f) As to the practice in such suits, see Consol. Gen. Ord. 1860, ix.

rr. 6, 7; xix. Gen. Ord. 5th Feb. 1861, r. 16. It will be remembered that a jurisdiction of a somewhat similar, though more limited, kind has been recently conferred on the New Divorce Court in reference to the questions of legitimacy and nationality. Vide sup. vol. 11. p. 254.

(g) Vide sup. p. 27.

(h) Archeion, 80, 81.

[“ not arrogate authority in every complaint that shall be brought before him, upon whatsoever suggestion: and thereby both overthrow the authority of the courts of common law, and bring upon men such a confusion and uncertainty, as hardly any man should know how or how long to hold his own assured to him.” And certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary, to have been endured in a country like this; which boasts of being governed in all respects by law, and not by will. But since the time when Lambard wrote, a set of great and eminent lawyers who have successively held the Great Seal, have by degrees erected the system of relief administered by a court of equity into a regular science; which cannot be attained without study and experience, any more than the science of law: but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode or suit, as readily and with as much precision, in a court of equity, as in a court of law.]

It would carry us beyond the bounds of our present purpose to go further into this matter. It seemed desirable to go so far; because strangers are apt to be confounded by nominal distinctions, and the loose unguarded expressions to be met with in the best of our writers; and thence to form erroneous ideas of the separate jurisdictions now existing in England, but which never were separated in any other country in the universe.

It hath also afforded us an opportunity to vindicate, on the one hand, the justice of our courts of law from being that harsh and illiberal rule, which many are too ready to suppose it; and, on the other, the justice of our courts of equity from being the result of mere arbitrary opinion, or

[an exercise of dictatorial power, which rides over the law of the land, and corrects, amends and controls it by the loose and fluctuating dictates of the conscience of a single judge.

III. It is now high time to proceed to the practice of our courts of equity thus explained and thus understood;] and in our remarks on this subject,—omitting all inferior jurisdictions,—we shall confine ourselves to the superior court, viz. the High Court of Chancery, held before the Lord Chancellor; with its branches, of which the Master of the Rolls and the Vice-chancellors are respectively the judges (i).

According to the present system of practice—comprising great improvements recently introduced by the provisions of various acts of parliament, and the General Orders of the court founded thereon (k),—[the first commencement of a *suit* in chancery,] which is analogous to an action in the common law courts, [is by preferring a bill (l) to the Lord Chancellor in the style of a petition: “humbly complaining, sheweth unto his lordship A. B. &c., the above-named plaintiff, as follows:—&c.” (m). This bill is in the nature

(i) As to the High Court of Chancery, vide sup. vol. III. pp. 414 et seq.

(k) See the statutes cited, sup. vol. III. p. 425, n. (z), et sup. p. 41. See also vol. I. pp. 258, 263, 272, 285, 484, 640, n., as to the jurisdiction recently conferred on this court in dealing with *settled estates*. As to the General Orders in Chancery (which were formerly extremely numerous), these have been recently consolidated into a single set, abrogating (with certain exceptions) as from the 14th Feb. 1860, all theretofore made. Since the promulgation of these Consolidated Orders additional ones have been issued, bearing date 6th March, 1860; 20th

March, 1860; 1st Feb. 1861; 5th Feb. 1861; 13th July, 1861; 16th August, 1861; 1st January, 1862; 16th May, 1862. There are, besides, sets of regulations of 8th August, 1857, as to business *in chambers*, and of 15th March, 1860, as to business in the *Registrar's* offices.

(l) It may be here observed that by 15 & 16 Vict. c. 86, parties seeking equitable relief were, in some cases, allowed to file a *claim* instead of a bill. But this mode of proceeding is now abolished. (See Consol. Gen. Ord. vii.i, r. 4.)

(m) See the form of a bill referred to in Consol. Gen. Ord. ix., r. 2, contained in sched. A. annexed to the Orders. As to the proper par-

[of a declaration at common law, or a libel and allegation in the spiritual courts (*n*); setting forth the circumstances of the case, as some fraud, trust or hardship; and praying relief, as the case may require (*o*). And if the object of the bill be to stay waste or other injury, or to stay proceedings at law, an injunction is also prayed (*p*).

The bill must be signed by counsel, as a certificate of its decency and propriety (*q*).] For neither the bill nor any other pleading must contain scandalous or impertinent matter, the costs occasioned by which will be ordered to be paid by the party introducing the same (*r*); and matter of a scandalous kind will be also ordered to be expunged (*s*).

The bill—which must be printed (*t*)—has also subscribed to it the names of the several defendants, and the name and place of abode of the plaintiff's solicitor. And it is filed in court (*u*), and served on the defendant by deliver-

ties to a suit, and objections in reference to want of parties, &c., new regulations were made by 15 & 16 Vict. c. 86, ss. 42, 43, 44, 49, 51, 52; and see Consol. Gen. Orders, vii. As to motion or application *without bill*, vide post, p. 65.

(*n*) Vide sup. vol. III. p. 450.

(*o*) See *South Eastern Railway Company v. Submarine Electric Company*, 23 L. J., Ch. 183; *Hill v. The Great Northern Railway Company*, 5 De G. M. & G. 66. Though the bill usually prays some equitable relief, yet by 15 & 16 Vict. c. 86, s. 50, no suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby; and it shall be lawful for the court to make binding declarations of right, without granting consequential relief.

(*p*) See *Wood v. Beadell*, 3 Sim. 273.

(*q*) See Consol. Gen. Ord. viii., ix.,

r. 2, et sched. A. As to *amending bill*, *ibid.* r. 8 et seq.

(*r*) See Consol. Gen. Ord. xl., r. 10, 11.

(*s*) See *ib.* xvi., r. 21. Formerly bills or other pleadings might be *excepted to* for impertinence as well as for scandal. But exceptions for impertinence, are now abolished by 15 & 16 Vict. c. 86, s. 17.

(*t*) Consol. Gen. Ord. ix. Where, however, the bill prays a writ of injunction, or a writ *ne exeat regno*; or is filed for the purpose solely, (or *inter alia*), of making an infant a ward of the court;—a written copy may be filed in the first instance, on the personal undertaking of the plaintiff, or his solicitor, to file a printed copy within fourteen days. (15 & 16 Vict. c. 86, s. 6.)

(*u*) Filing is now performed by the clerks of records and writs. (5 & 6 Vict. c. 103; 15 & 16 Vict. c. 86, s. 1; Consol. Ord. viii.) By Ord.

ing a copy thereof either to himself personally, or leaving the same at his dwelling-house (*x*). And on the bill so served there is an indorsement, commanding the defendant to appear within eight days after the service, and that he observe what the court shall direct (*y*).

If the defendant, on service of the bill, should neglect to appear within the time limited by the rules of the court,—*i. e.*, when he is within the jurisdiction of the court, within eight days after service (*z*)—the plaintiff may apply that an appearance may be entered for him; and such further proceedings may be had in the cause as if defendant had actually appeared (*a*).

If, on the other hand, the defendant absconds, so that it is found impracticable to serve the bill, the court may order an appearance at a certain day, a copy of which order shall be inserted in the London Gazette, and otherwise published as the court may direct; and if the defendant should fail to appear at the time so appointed, the court may order an appearance to be entered for him on the application of the plaintiff (*b*). In cases also where the

vi. every bill before being filed must be marked (at the option of the plaintiff) either with the words "lord chancellor" or the words "master of the rolls;" and where the bill is marked "lord chancellor," the plaintiff shall also write underneath, the name of one of the vice-chancellors for the time being; and the cause shall thenceforth be attached to the court of the master of the rolls or of such vice-chancellor, as the case may be.

(*x*) 15 & 16 Vict. c. 86, s. 5; Consol. Gen. Ord. x.

(*y*) 15 & 16 Vict. c. 86, s. 3, and schedule to the Act. This service of the bill, with an indorsement, is in lieu of the former practice of serving a writ of *subpœna*, which is abolished.

(15 & 16 Vict. c. 86, ss. 2, 3.) Where no account, payment, conveyance or other direct relief is sought against a party to a suit, the endorsement requiring such party to appear need not be made. (Consol. Gen. Crd. x., r. 11.)

(*z*) Consol. Gen. Ord. x., r. 3. It will be remembered that the same period for appearance is given to the defendant in an action on being served with a writ of summons. (Vide sup. vol. III. p. 586.)

(*a*) 15 & 16 Vict. c. 86, s. 4. See Consol. Ord. x., rr. 3, 4. See also Ord. xxii.

(*b*) 15 & 16 Vict. c. 86, s. 4; Consol. Ord. x., r. 6. See also 11 Geo. 4 & 1 Will. 4, c. 36, s. 3.

defendant's intention to leave the kingdom, in order to avoid process, is known, and there is an equitable demand against him of a pecuniary kind and of certain amount, the plaintiff is entitled immediately, upon bill filed and upon a proper affidavit of the facts, to apply to the court for a writ of *ne exeat regno* to restrain the defendant's departure, until security for payment shall have been given (c).

Upon the defendant's appearance, the plaintiff is entitled to have the defendant examined in answer to the bill, and for that purpose to file interrogatories(d); a copy of which is to be delivered to the defendant, who within due time must either put in his *answer*, or his *demurrer* or *plea*; and even if the plaintiff requires no answer, yet it is competent to the defendant, if he think fit, to put in any of these, of his own accord. If on the other hand, on an answer being required, he neither answers, pleads nor demurs, he is then said to be in contempt(e); and upon proper process in that behalf he may be committed to prison (f), or, (if he is not to be found,) his lands and goods may be sequestered, until he clears his contempt(g). The plaintiff also, in such case, is entitled either to proceed with the cause as if the

(c) See Dan. Pr. by Headlam, p. 271. If the defendant be out of the jurisdiction of the court, at the time the suit is commenced, the court may order the bill to be served in such places as it thinks fit. (15 & 16 Vict. c. 86, s. 4; Consol. Gen. Ord. x., r. 7.)

(d) Formerly the interrogatories were contained in the bill itself, and were inserted in every case. But now by 15 & 16 Vict. c. 86, s. 10, the bill shall contain no interrogatories for the examination of the defendant. As to their form and the rules of practice concerning them see Consol. Gen. Ord. xi. et

sched. B.

(e) See Consol. Gen. Ord. xii. as to the process by attachment on such contempt.

(f) As to chancery prisoners in contempt, see 23 & 24 Vict. c. 149.

(g) He is also in contempt, if after service he fails to appear; but in this case, as already stated, there is now a remedy, by entering an appearance for him, which has caused the process by attachment for contempt in such cases to be nearly disused; and by Consol. Gen. Ord. x., r. 10, an attachment for want of appearance cannot now issue without special order of the court.

defendant had filed an answer traversing the case made by the bill (*h*); or else upon the execution of an attachment against the defendant for such contempt, to have an order that the bill be taken *pro confesso* (*i*). If the defendant, however, makes oath that, by reason of poverty, he is unable to employ a solicitor to put in his answer, and the allegation should appear to be true, a solicitor and counsel will be assigned him by the court for that purpose (*j*).

But the defendant shall be supposed to pursue the regular course; and either to demur, to plead, or to answer.

[A *demurrer* in equity is nearly of the same nature as a demurrer in law, being an appeal to the judgment of the court,] whether upon the face of the bill itself the defendant shall be bound to answer;—as, [for want of sufficient matter of equity therein contained;] or by reason of the bill seeking [a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehaviour.] And the effect of a demurrer is that, if allowed, the plaintiff's bill shall be dismissed; if overruled, the defendant is ordered to answer (*k*).

A *plea* is founded upon some matter not apparent on the face of the bill; and [may be either to the jurisdiction; showing that the court has no cognizance of the cause; or to the person, showing some disability in the plaintiff,—as by outlawry and the like. Or it is in bar; showing some matter wherefore the plaintiff can demand no relief,—as an Act of Parliament, a release, or a formal decree (*l*). And the truth of any plea the defendant is bound to prove, if put upon it by the plaintiff. But as bills are often of a

(*h*) The plaintiff's course in such a case is to file a *traversing note* to the above effect. (See Consol. Gen. Ord. xiii.)

(*i*) Consol. Gen. Ord. xxii. A defendant against whom an order to take a bill *pro confesso* is made, is at liberty to appear at the hearing of the cause; and if he waives all ob-

jection to the order, but not otherwise, he may be heard to argue the case upon the merits, as stated in the bill. (Ibid. r. 7.)

(*j*) See Consol. Ord. iii.

(*k*) As to the practice on demurrers, see *ibid.* xiv.

(*l*) As to pleas, see *ibid.*

[complicated nature, and contain various matter, a man may plead as to part, demur as to part, and answer as to the residue. But no exceptions to formal *minutiæ* in the pleadings, will be here allowed; for the parties are at liberty, on the discovery of any errors in form, to amend them (*m*).

An *answer* is the most usual defence that is made to a plaintiff's bill.] It is the statement of the defendant himself as to those matters of fact to which the bill refers, or as to which interrogatories are filed; and by means of it, the plaintiff obtains a *discovery*, as it is called, of facts which it might be otherwise impossible to prove (*n*). This statement [is given in upon oath, or the honour of a peer or peccress (*o*); but where there are amicable defendants, their answer is usually taken without oath, by consent of the plaintiff (*p*).]

[An answer must either deny or confess all the material parts of the bill.] And where it does not deny, [it may confess and avoid, that is, justify or palliate the facts;] or it may simply admit the case made by the bill, and submit

(*m*) "*En cest Court de Chauncerie, homme ne serra prejudice par son mispleyding ou pur default de forme, mes solonque le veryte del mater, car il doit agarder solonque consciens, et n'emi ex rigore juris.*"—(Dyversité des Courtes, edit. 1534, fol. 296, 297; Bro. Abr. tit. Jurisdiction, 50.)

(*n*) As to the practice on answers, see Consol. Gen. Ord. xv. Until a recent period, the party to an action could not be compelled, in a court of common law, to give evidence; and *discovery* was an incident, therefore, peculiar to a court of equity; and one that of course tended most materially to amplify its jurisdiction. But, by 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83, either of the parties is now, in most cases, competent and compellable to be

examined as a *witness* at the trial of the cause. And, by 17 & 18 Vict. c. 125, ss. 51—57, interrogatories may now be delivered, in actions in the common law courts, by either of the parties, to the opposite party, as to any matter on which *discovery* may be sought. (Vide sup. vol. III. p. 633.)

(*o*) See Consol. Gen. Ord. xv., r. 6. But if a peer be examined as a *witness*, he must be sworn. (*Meers v. Lord Stourton*, 1 P. W. 146.) In the case of a *corporation aggregate*, the answer must be under their common seal. (Consol. Gen. Ord. ubi sup.)

(*p*) Answers must be printed and signed by counsel. See Consol. Gen. Ord. xv. sched. (C.), and Gen. Ord. 6th March, 1860.

to the judgment of the court upon it. But the defendant may in his answer, besides addressing himself to the bill or interrogatories, introduce such statements material to the case, as he may think it advisable to set forth; and he is also at liberty, in support of his case, to file interrogatories for the examination of the plaintiff, in order to obtain from him a discovery of any material facts (*q*). Where, however, he has any relief to pray against the plaintiff, [he must do it by an original bill of his own, which is called a *cross bill* (*r*).]

If the plaintiff considers the answer as insufficient, he may take and file *exceptions* thereto, (which, if allowed, will oblige the defendant to put in a more sufficient one). On the other hand, [if the plaintiff finds sufficient matter confessed in the answer to ground a decree upon, he may proceed to the *hearing of the cause upon bill and answer only*; but in that case, he must take the defendant's answer to be true in every point.] If, therefore, he finds that it would be unsafe to admit this, and that his case requires him to controvert the truth of some matter that the defendant has alleged; or to go into evidence in support of what he has himself alleged; he is at liberty to *reply* to the answer, to the effect that he "hereby joins issue with the defendant" (*s*). So a replication to the same effect may be filed by the plaintiff, in case he shall not have required an answer, and the defendant shall not have exercised his right of putting in an answer, plea, or demurrer, without requisition,—for the rule is, that the defendant in this case shall be considered as having *traversed* (or denied) the case made by the bill (*t*). Upon the filing of the replication, either under these circumstances, or after an answer made, the cause is deemed to be *at issue* (*u*); and the parties then proceed to proof of the facts.

(*q*) 15 & 16 Vict. c. 86, s. 19.
The plaintiff's answer to such interrogatories, must be printed. (Gen. Ord. 6th March, 1860.)

(*r*) As to cross bills, see Consol. Gen. Ord. xix., r. 5.

(*s*) Ibid. xviii., r. 2.

(*t*) 15 & 16 Vict. c. 86, s. 26; Consol. Gen. Ord. xvii., r. 1.

(*u*) Consol. Gen. Ord. xvii. The cause was formerly not at issue till

However, it is competent to the plaintiff under any circumstances, instead of filing a replication, to take the course, (after answer, or after the time for answer has expired,) of *moving the court for such decree or decretal order as he may think himself entitled to*; upon which both he and the defendant, will be at liberty to file affidavits on either side: and the cause will be disposed of in this summary way, upon motion; or the court will give such directions as to the further prosecution of the suit, as the circumstances may be found to require (x).

But if, instead of this, a replication be filed, and the cause be brought to issue, and the parties proceed to proof in the regular way;—the plaintiff (or any defendant) may apply to the judge in chambers for an order that the evidence in chief as to any particular facts or issues, shall be taken *vivâ voce* at the hearing of the cause, and in case such application is granted, both the examination in chief, and also the cross-examination and re-examination, as to the facts and issues specified in the order made, are taken before the court at the hearing accordingly. In case, however, no such application or order shall be made,—and as to any facts or issues not included by any such order made,—each party in a cause is at liberty to verify his case, either wholly or partially, by the oral examination of witnesses *ex parte* before one of the examiners of the court (y), or before a special examiner appointed for the purpose. At such examination only the party producing the witness, his counsel, solicitor or agent shall have a right to be present. And the examiner takes down their depositions (z), which are afterwards transmitted by him to the Record Office of the court, to be filed; and any party to the suit is entitled to have copies

the service of a *subpœna to rejoin*; but no *subpœna to rejoin* is now issued. (Ibid.)

(x) 15 & 16 Vict. c. 86, s. 15.
See Consol. Gen. Ord. xxiii., r. 4.

(y) As to the examiners of the

Court of Chancery, see 16 & 17 Vict. c. 22.

(z) Every examination so taken *ex parte*, shall be deemed to be an *affidavit*. (Gen. Ord. 5th Feb. 1861, r. 6.)

thereof, on payment of a regulated fee (*a*). As to the proof so taken, we need only add, that the rules as to the competency of witnesses, and generally the whole law of evidence, are the same as those which obtain in a court of common law, and to which our attention was called in a former part of the work (*b*).

The evidence (however taken) must be *closed* within a certain period, limited by the practice of the court (*c*); and the cause is then ripe to be set down for hearing (*d*); [and either party may be *subpœnaed* to hear judgment on the day fixed for the hearing; and then, if the plaintiff does not attend, his bill is dismissed with costs.] On the other hand, if the defendant makes a default, a decree will be made against him (*e*).

[When there are cross causes, or a cross bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of

(*a*) All affidavits and depositions used at the hearing, are required to be printed. (Gen. Ord. 16th May, 1862.) The course of taking proof above described was substituted by Gen. Ord. 5th Feb. 1861, (see 23 & 24 Vict. c. 128,) for that prescribed by 15 & 16 Vict. c. 86, under which all the parties might be (at the option of any of them) publicly examined, cross-examined, and re-examined before the examiner—a course which, by *agreement*, may still be adopted. (Gen. Ord. 3rd Feb. 1861, r. 10.) Prior to the 15 & 16 Vict. c. 86, the course of proof was by the examination of the witnesses before *commissioners*, taking their written depositions in answer to written interrogatories, and in the absence of the parties, according to the method of the civil law.

(*b*) Vide sup. vol. III. pp. 639 et seq.

(*c*) Consol. Gen. Ord. xix.; Gen. Ord. 5th Feb. (1861), r. 5.

(*d*) The hearing may be before either the master of the rolls or one of the vice-chancellors, according to the court which has been selected, or it may take place, if so ordered, before the lord chancellor himself. Within four weeks after the evidence is closed, the plaintiff is required to set down the cause for hearing and obtain and serve on the defendant a subpœna to hear judgment. After the expiration of that time, the cause may be brought on by the defendant. (See Consol. Gen. Ord. xxi.)

(*e*) By Consol. Gen. Ord. xxiii., r. 12, where a defendant makes default at the hearing of a cause, the decree shall be absolute in the first instance, without giving the defendant a day to show cause.

[them. The method of hearing causes in court is this.] The parties on both sides appearing by their counsel, the plaintiff's counsel open the pleadings and state his case, the matters in issue, and the points of equity arising therefrom. They also read in court such affidavits and depositions as may have been taken by the plaintiff, together with such parts of the defendant's answer as are thought material or convenient, and make their observations and arguments thereon. Then the defendant's counsel go through the same process for him, and the leading counsel for the plaintiff is heard in reply. [When all are heard, the court pronounces the *decree*, adjusting every point in debate according to equity; which decree being usually very long, the minutes of it are taken down by the Registrar. The matter of costs to be given to either party is not here held to be a point of right but merely discretionary, (by the stat. 17 Ric. II. c. 6,) according to the circumstances of the case, as they appear more or less favourable to the party vanquished. And yet the stat. 15 Hen. VI. c. 4, seems expressly to direct, that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court (*f*).

The decree is either *interlocutory* or *final*. It very seldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, this court usually directs the matter to be tried by jury; especially such facts as the validity of a will, or whether A. is the heir at law to B.] This was formerly (as no jury could then be summoned to attend this court,) always directed to be tried in a court of common law, and in the form of a *feigned issue*; that is, a series of pleadings was arranged between the parties, in the same form as if an action had been commenced at common law, upon a *wager* involving the fact in dispute; and the issue

(*f*) As to equity costs generally, see Seton on Decrees, p. 90, 3rd ed.; Dan. Chan. Pr. pp. 1027 et

seq. As to the practice on taxing costs, &c., see Consol. Gen. Ord. xl.

joined thereon was referred, (as it would be in the case of an ordinary action,) to a jury. But *feigned issues* were disused after the 8 & 9 Vict. c. 109, s. 19, which made it lawful for any court either of law or equity to refer any question of fact to a jury in a direct form. And by 21 & 22 Vict. c. 27, ss. 3—6, provisions were made enabling the Court of Chancery itself to summon a jury to try any questions of fact (*g*). Moreover, it was formerly the practice to refer questions of law to the opinion of one of the superior courts of common law, who, after argument, certified their opinion to the Lord Chancellor, and on such certificate the decree was usually founded. But by 15 & 16 Vict. c. 86, s. 61, the practice of directing a case to be stated for the opinion of a common law court was prohibited, power being, at the same time, given to the Court of Chancery to determine any questions of law necessary to the decision of the equitable question at issue (*h*). And now, by 25 & 26 Vict. c. 42, it is further enacted, that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery, shall be sought in any cause or matter pending there, and whether the title to such relief or remedy be or be not incident to or depending upon a legal right,—every question of law or fact cognizable in a court of common law, on the determination of which the title to such relief or remedy depends, shall be determined in the Court of Chancery. It is, however, provided that if such course appears more convenient, any question of fact may be directed to be tried at the assizes or sittings for London or Middlesex; and that nothing in that Act shall make it necessary for a court of equity to grant relief in any suit concerning any matter as to which a court of common law has concurrent jurisdiction, if it shall appear to the court that such matter

(*g*) See Consol. Gen. Ord. xli., r. 26 et seq.

(*h*) By 14 & 15 Vict. c. 83, s. 8, provisions are made for obtaining,

upon the request of the lord chancellor, the presence of one of the common law judges at the sitting of the court.

has been improperly brought into equity, and ought to have been left to the sole determination of a court of common law (*i*).

[Another thing also retards the completion of decrees. Frequently long accounts are to be settled, incumbrances and debts to be inquired into, and a hundred little facts to be cleared up, before a decree can do full and sufficient justice.] The investigation of these matters is conducted either by the Master of the Rolls, (or by one of the Vice-chancellors,) sitting *at chambers*; or by his chief clerk acting there under his direction. And the result is stated in the form of a short certificate, (or, if the judge so directs, a formal report); which, if the judge approves, he signs and adopts (*j*).

When the inquiries, directed by the decree, are completed, the cause is again brought before the court. A final decree is then made, the performance of which is enforced, if necessary, by attachment of the person (*k*) and sequestration of the estate (*l*). On due service also of a decree or order for delivery of possession of an estate, the party prosecuting the same is entitled to a *writ of assistance*; directed to the sheriff of the county in which the lands lie, and authorizing him to enter the premises and eject the defendant, and put the plaintiff in possession. Moreover, by 11 Geo. IV. & 1 Will. IV. c. 36, s. 15, where any person has been committed for a contempt, for not executing any instrument as the court has directed, the court may, under such circumstances as in the statute mentioned,

(*i*) 25 & 26 Vict. c. 42, s. 4.

(*j*) As to preliminary accounts and inquiries, see Consol. Gen. Ord. xx. It is provided by 15 & 16 Vict. c. 18, ss. 26—30, that this course may be taken with respect to all such matters as may be more conveniently disposed of at chambers than in open court. Such matters as these were formerly referred to a master in chancery. As to the

masters in chancery, vide sup. vol. III. p. 426, note (*b*).

(*k*) See Roberts v. Ball, 3 Smale & Giff. 168.

(*l*) See Consol. Gen. Ord. xxix., r. 3. When a decree is obtained against a person having privilege of peerage or of parliament, there can be no proceeding by attachment, but it must be by sequestration only.

order the same to be officially executed. And by 1 & 2 Vict. c. 110, s. 1, all decrees and orders of the courts of equity, and all orders of the Lord Chancellor in matters of lunacy, (whereby any sum of money or costs shall be payable to any person,)—shall have the effect of judgments in the superior courts of common law (*m*); and the persons to whom the payment is to be made shall be deemed judgment creditors, within the meaning of that Act (*n*).

[If by the decree either party thinks himself aggrieved, he may petition for a *rehearing*] before the judge by whom it was pronounced, (whether the Lord Chancellor, the Master of the Rolls, or one of the vice-chancellors); or, unless pronounced by the Lord Chancellor himself, may *appeal* to the Lord Chancellor; and the Lord Chancellor may, if he think fit, refer the matter to the court of appeal in chancery (*o*). [But after the decree is once signed] by the Lord Chancellor, which is always necessary before enrolment (*p*), [and enrolled,—it cannot be reheard or rectified, but by bill of review, or by appeal to the House of Lords.

A *bill of review* may be had upon apparent error in judgment, appearing on the face of the decree; or, (by special leave of the court,) upon oath made of the discovery of new matter of evidence, which could not possibly be had or

(*m*) As to the effect of judgments in the superior courts of common law, and the recent enactments, requiring, in certain cases, that, in order to bind land, &c., they must be *registered*, &c., vide *sup.* vol. III. pp. 669—671.

(*n*) If payment on such decrees and orders be not made within one month from the entry of the decree or order, the person to whom it was ordered to be made may sue out one or more writs of *fiari facias* or *elegit*, and *venditioni exponas*, of the same nature with the writs issued, under those names, by the courts of com-

mon law. (Consol. Gen. Ord. xxix., r. 6.)

(*o*) By Consol. Gen. Ord. xxxi., r. 1, no appeal or rehearing shall be allowed unless set down for hearing, and notice thereof served, within five years from the date of the decree—except by special order. Appeals may be heard either before the lord chancellor sitting alone, or before the court of appeal in chancery, at the discretion of the lord chancellor. (14 & 15 Vict. c. 83, s. 12.) As to the court of appeal in chancery, vide *sup.* vol. III. p. 42.

(*p*) 3 Geo. 2, c. 30.

[used at the time when the decree passed. But no new evidence or matter, then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review (*q*).

An *appeal to parliament*, that is, to the House of Lords (*r*), is the dernier resort of the subject who thinks himself aggrieved (*s*) either by an interlocutory order or a final determination in this court (*t*); and it is effected by *petition* (*u*) to that House,] the decree or order having been first enrolled (*x*). The petition in this case must be signed by two counsel (of those engaged in the court below, or on the appeal), who must certify that there is a reasonable

(*q*) As to bills of review, see Consol. Gen. Ord. xxxi., r. 9—14.

(*r*) Vide sup. vol. III. p. 429.

(*s*) This jurisdiction is said (Com. Journ. 13th March. 1704) to have begun in the eighteenth year of James the first; and it is certain that the first petition which appears in the records of parliament was preferred in that year (Lords' Journ. 23rd March, 1620); and that the first which was heard and determined, (though the name of *appeal* was then a novelty,) was presented in a few months after (Lords' Journ. 3rd, 11th, 12th December, 1621).—both levelled against the lord chancellor Bacon for corruption and other misbehaviour. It was afterwards warmly controverted by the house of commons, in the reign of Charles the second. (Com. Journ. 19th November, 1675.) But this dispute is now at rest; (Show. Par. Ca. 81;) it being obvious to the reason of all mankind, that when the courts of equity became principal tribunals for deciding causes of property, a revision of their decrees, by way of appeal, became as necessary as the revision of the judgments of the courts of common

law, by a proceeding in error.

(*t*) By 14 & 15 Vict. c. 83, s. 10, this extends to the decisions of the court of appeal in chancery.

(*u*) By 55th Standing Order, House of Lords, 13th July, 1678, petitions of appeal from any court of equity must be presented within fourteen days after the first day of the meeting of parliament, or fourteen days after the decree made and entered. And by 118th Order, no petition of appeal from any decree in equity shall be received after two years from the signing and enrolling or extracting of the decree, and the end of fourteen days after the first day of the meeting of parliament next ensuing, unless the appellant be under disability, &c.

(*x*) As the general rule, a decree or order must be enrolled within six months after it has been pronounced or made. But the petitioner may apply for an order, to the judge to whose court the cause is attached, to be allowed to enrol it, within five years. After that period it can only be enrolled by order of the lord chancellor, or lords justices. (Consol. Gen. Ord. xxiii.)

cause of appeal(*y*). Upon presenting which, and upon the appellant's entering into recognizance to pay all such costs as the House shall think fit to award(*z*), an order is made directing the respondent to put in his answer; which being done, either party may then apply to have the cause appointed for hearing: and the appellant and respondent are respectively to deliver their printed cases,—signed by one or more counsel engaged in the court below or in the hearing of the appeal, and containing a narrative of the proceedings below, with so much of the proofs as the parties intend respectively to rely upon(*a*). [But no new evidence is admitted in the House of Lords upon any account,—this being a distinct jurisdiction(*b*): which differs it very considerably from those instances wherein the same jurisdiction revises and corrects its own acts, as in rehearings and bills of review. For it is a practice unknown to our law, (though constantly followed in the spiritual courts,) when any superior court is reviewing the sentence of an inferior, to examine the justice of the former decree, by evidence that was never produced below.]

We have thus touched upon the principal circumstances of a suit in chancery, adhering throughout to the regular and ordinary course of that proceeding. But there are some variations and occasional incidents, of which it will be proper here to take some notice.

1. It often happens in the course of a suit, that either of the parties have occasion to *amend*; and more particularly this happens in the case of a plaintiff, where, upon the putting in of the answer, the new light afforded by it suggests the necessity of adding new parties, or introducing new matter by way of amendment of his bill. Such an amendment is in all cases allowed, at least upon payment of costs; and the defendant (if required) must answer afresh

(*y*) 58th Standing Order, House of Lords, 3rd March, 1697.

(*z*) See Ord. 26th Jan. 1810.

(*a*) See Lords' S. O. cxv, cxvii.

(*b*) Gilb. Rep. 155, 156.

to the bill so amended. And this extends even to facts which may have occurred since the institution of the suit, if the cause is otherwise in such a state as to allow of amendment; or if not, the plaintiff is at liberty to annex a statement of such facts to the bill, and to require an answer to it from the defendant (c).

2. It frequently happens that the suit is abated by death or marriage of parties, or becomes defective by reason of some change or transmission of interest or liability. In such cases an order of *revivor* or a *supplemental* order to revive or carry on the proceedings, may in general be obtained as of course (d); and by serving it on all proper persons, they will become parties to the suit, and will be bound to appear to the same;—a guardian *ad litem* however being first appointed for such of them as may be infants or under any disability, that of coverture excepted (e).

3. By another provision also recently introduced, with a view to the object of diminishing delay and expense, persons interested in any question cognizable in the Court of Chancery (other than questions in bankruptcy, which constitutes a distinct and peculiar subject of jurisdiction), if they can concur in stating such question in the form of a *special case* for the opinion of the court,—are entitled to file such special case accordingly; subject to certain provisions for the protection of lunatics, married women, and infants, when they are included as concurring parties. And such special case having been set down for hearing, the court is authorized to determine the question, and by decree to declare its opinion thereon, without proceeding to administer any relief. And the declaration shall be as binding as it would have been if it had been contained in a decree made in a suit between the same parties, instituted by bill; and all executors, administrators, or trustees, making any pay-

(c) 15 & 16 Vict. c. 86, s. 53; Consol. Gen. Ord. ix., rr. 8—24.

(d) See 17 & 18 Vict. c. 100, s. 3.

(e) 15 & 16 Vict. c. 86, s. 52;

Consol. Gen. Ord. xxxii. Prior to this statute, it was necessary in such cases to resort to a *bill of revivor*, or in some instances to a *supplemental bill*.

ment, or doing any act in conformity with the declaration, shall be protected, as they would have been by the express order of the court, made in such suit (*f*).

4. There may also take place in the course of a suit—and sometimes without bill (*g*),—certain occasional or interlocutory incidents, viz. *motions* (*h*) and *petitions* (*i*). The first of these may be made at all stages of a suit, and are analogous to motions in the court of common law (*k*): but with this difference, that instead of granting, on a hearing *ex parte*, a rule to show cause in the first instance, a court of equity proceeds, in the first instance, to a hearing of the parties on both sides; requiring him, however, by whom the motion is made, to give previous notice to his adversary of the nature and time of the intended application. A *petition*, also, is an incident of an interlocutory kind similar in general to a motion; but adopted in certain cases where a more special statement is required, than can conveniently be comprised in a mere notice of motion. Such statement is accordingly prepared in the form of a petition to one of the judges in equity,—concluding with a prayer of the appropriate relief; on which a day is appointed by the judge for the hearing, and a copy of the petition and the appointment served on the opposite party.

5. Finally, it is to be remarked, that, though a suit in chancery is in general instituted by bill, this is not invariably the case,—for where the equitable rights of the Crown are concerned, (or the rights of those who are under its particular protection, such as the objects of a public charity,) the matter of complaint is brought forward by way of *information* filed in the name of the attorney-general or

(*f*) 13 & 14 Vict. c. 35. An analogous provision was introduced, as regards a suit at law, by 3 & 4 Will. 4, c. 42, s. 25, and has been since extended by 15 & 16 Vict. c. 76, s. 42. Vide sup. vol. III. pp. 663, 664.

(*g*) See 18 & 19 Vict. c. 131, s. 16.

(*h*) See Consol. Gen. Ord. xxxiii.

(*i*) See *ibid.* xxxiv.

(*k*) As to motions, vide sup. pp. 2, 3.

of the solicitor-general (*l*). If the rights of the Crown itself are not concerned, this is done at the instance of some person whose name is inserted in the information; and who is termed the *relator*, and made responsible for costs. Proceedings in chancery indeed in the matter of charities, may also be by another method. For by 52 Geo. III. c. 101, in all cases of breach of charitable trust—or whenever the direction of a court of equity shall be deemed necessary for the administration of such trust—any two or more persons may, (on obtaining the previous sanction of the attorney-general or solicitor-general,) apply for relief by way of *petition* to the Lord Chancellor, Master of the Rolls, or Keeper of the Great Seal; and such person shall be heard in a summary way; and the order which the court makes thereon shall be conclusive, unless within two years afterwards there be an appeal to the House of Lords (*m*).

(*l*) In the construction of the Consol. Gen. Ord. the word “bill” is to include “information.” (Preliminary Order, r. 4; see also 2 Madd. 164.)

(*m*) See also the provision contained in 16 & 17 Vict. c. 137 (The

Charitable Trusts Act, 1853), s. 28, as to making application at *chambers*, (and without information, bill or petition), in matters relating to charities. And as to the practice under this provision, see Consol. Gen. Ord. xli., r. 10, et seq.

CHAPTER XIV.

OF INJURIES PROCEEDING FROM OR AFFECTING THE CROWN.



HAVING thus considered the civil injuries, or [private wrongs, that may be offered by one subject to another,—all of which are redressed by the command and authority of the sovereign signified by his writs returnable in his several courts of justice, which thence derive jurisdiction of examining and determining the complaint,—we proceed now to inquire into the mode of redressing those injuries, to which the Crown itself is a party. Which injuries are either when the Crown is the aggressor,—and which therefore cannot without a solecism admit of the same kind of remedy (*a*);—or else is the sufferer, and which then are usually remedied by peculiar forms of process appropriated to the royal prerogative.

In treating therefore of these we will consider, first, the manner of redressing those wrongs or injuries which a subject may suffer from the Crown; and then of redressing those, which the Crown may receive from a subject.

I. As to the method of redressing such injuries as the subject may receive from the Crown.

That the sovereign can do no wrong is a necessary and fundamental principle of the English constitution;] yet, as observed in a former part of this work, his acts may in themselves be contrary to law, and subject on that ground to reversal (*b*).

(*a*) Bro. Ab. tit. Petition, 12, tit. Prerog. 2.

(*b*) Vide sup. vol. 11. pp. 482, 498.

For [whenever it happens that, by misinformation or inadvertence, the Crown hath been induced to invade the private rights of any of its subjects,] and the sovereign becomes by a proper representation informed of the injury sustained,—the law always then [presumes that to know of any injury and to redress it, are inseparable in the royal breast;] and [issues as of course, in the sovereign's own name, his order to his judges to do justice to the party aggrieved.]

Though [the distance between the sovereign and his subjects is such that it rarely can happen,] as observed in a former place (c), [that any *personal* injury can proceed from the prince to any private man;] and the law [in decency supposes that it never can or will happen at all;] yet [injuries to the rights of *property* can scarcely be committed by the Crown without the intervention of its officers. And for these officers the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors or misconduct of those agents, by whom the sovereign has been deceived and induced to do a temporary injustice.]

As in ordinary cases, however, the Crown itself is the medium through which justice is obtained, so no relief can in general be had against the Crown by the ordinary methods of the common law or equity (d); but only by such

•(c) Vide sup. vol. II. p. 499.

(d) 3 Bl. Com. 255; Jenkins, 78; Finch, L. 83. It is said, in some books, that before the time of Edward the first, the king might be sued as a common person, the form being, "*Præcipe Henrico regi Angliæ;*" but this seems of questionable authority. (See Bac. Ab. Prerog. E. 7.) Where the rights of the Crown, however, extend only to the superintendence of a public trust,—as in the case of a charity, or where its rights are only in-

cidentally concerned, and no attempt is made to divest its possession or title,—the proceeding may be by bill in Chancery, making the attorney-general defendant; and even when the object is to divest the title or possession of the Crown, the sovereign may refer it to the lord chancellor to do right; and may direct that the attorney-general shall be made a party to a suit in Chancery, to that purpose. See Christian's Bl. vol. iii. p. 428; Balch v. Wastall, 1 P. Wms. 445; Reeve v.

special forms of proceeding as the common law has provided for this particular case.

[The common law methods of obtaining possession or restitution from the Crown, of either real or personal property, are 1st, by *petition de droit* or petition of right; 2ndly, by *monstrans de droit*, manifestation or plea of right (*e*): both of which may be preferred or prosecuted either on the common law side of the Court of Chancery, or in the Exchequer (*f*). The former is of use when the Crown is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the petition itself: in which case he must be careful to state truly the whole title of the Crown, otherwise the petition shall abate (*g*); and then, upon this answer being indorsed or underwritten by the Crown *soit droit fait al partie*—let right be done to the party (*h*),—a commission shall issue to inquire into the truth of the suggestion (*i*). After the return to which the attorney-general is at liberty to plead in bar; and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. Thus, if a disseisor of lands which are holden of the Crown, dies seised without any heir, whereby the Crown is *primâ facie* entitled to the lands, and the possession is cast on it, either by inquest of office, or by act of law without any office found; now the disseisee shall, here, have remedy by petition of right, suggesting the title of the Crown, and his own superior right before the disseisin made (*k*).]

Attorney-General, 1 Ves. 445; *Simpson v. Clayton*, 4 Bing. N. C. 766; 2 Roll. Abr. 213; *Miff. Treat. on Pleadings in Chancery*.

(*e*) As to these remedies (the first of which is said to owe its origin to Edw. 1), see Co. Entr. 402, 419; Bro. Ab. tit. Prerog. 2; Fitz. Ab. tit. Error, 8; *Smith v. Upton*, 6 Man. & G. 252; *Baron de Bode's case*, 8 Q. B. 208; *Simpson v. Clayton*, ubi sup. See also a Treatise

on the Prerogative of the Crown, by Mr. Chitty, jun.; where full information will be found as to the proceedings therein.

(*f*) A *petition of right* may now, however, be instituted in any of the superior courts, (vide post, p. 71.)

(*g*) *Finth*, L. 255.

(*h*) *St. Tr.* vii. 134.

(*i*) *Skin.* 608; *Rast. Ent.* 461.

(*k*) Bro. Ab. tit. *Petition*, 20; 4 Rep. 58.

But where the Crown is in possession, under a title the facts of which are already set forth upon record, a party thereby aggrieved may have *monstrans de droit*; which is putting in, in opposition to such recorded title, a claim of right grounded on certain facts relied upon by the claimant, without denying those relied upon by the Crown (*l*); [and praying the judgment of the court, whether upon those facts the sovereign or the subject had the right.] As if, in the case before supposed, it is found by inquisition or inquest of office, (a proceeding that we shall have occasion presently to explain,) that a tenant of the Crown died seised without heir, whereby the Crown is *primâ facie* entitled,—the disseisee may have remedy by *monstrans de droit* at the common law (*m*), setting forth that he had been disseised by such tenant (*n*). And [as the remedy by *petition* was extremely tedious and expensive, that of *monstrans* was much enlarged, and rendered almost universal by several statutes (particularly 36 Edward III. c. 13, and 2 & 3 Edward VI. c. 8) which also allow inquisitions of office to be *traversed* (or denied), whenever the right of a subject is concerned, except in a very few cases (*o*).]

As to the course of proceeding, we may remark, that [if upon either the *petition de droit* or *monstrans de droit*, the right be determined against the Crown, the judgment is] that of *ouster le main*, or *amoveas manus*, viz. [*“quod manus domini regis amoveantur, et possessio restituatur petenti, salvo jure domini regis”* (*p*)]—which last clause is always added to judgments against the sovereign (*q*), to whom no laches is ever imputed; and whose right—till some late statutes (*r*),—was never defeated by any limitation or length

(*l*) According to Blackstone (vol. iii. p. 256), a *monstrans de droit* is putting in a claim of right founded on facts already acknowledged and established. But it is clear that new facts may be introduced in a *monstrans de droit* by virtue of the statutes 36 Edw. 3, c. 13, and 2 & 3 Edw. 6, c. 8. (See Co. Entr. 402.)

(*m*) 4 Rep. 55. See also Bac. Abr. tit. Prerog. E. 7.

(*n*) Co. Entr. ubi sup.

(*o*) Skin. 608.

(*p*) 2 Inst. 695; Rast. Ent. 463.

(*q*) Finch, L. 460; see stat. 2 & 3 Edw. 6, c. 8, s. 14.

(*r*) Vide sup. vol. II. p. 503; vol. III. pp. 563, 564.

[of time. And by such judgment, the Crown is instantly out of possession (*s*); so that there needs not the indecent interposition of his own officers, to transfer the seisin, from the sovereign, to the party aggrieved.]

The proceedings upon a petition of right, have however been made the subject of a recent statute (23 & 24 Vict. c. 34), under which the petition may, if the suppliant think fit, be intituled in any one of the superior courts of law or equity at Westminster, in which the subject-matter of the petition would have been cognizable, if the same had been a matter in dispute between subject and subject; and it is provided, that such petition shall be left with the secretary of state for the home department for her Majesty's consideration, who, if she shall think fit, may grant her fiat that right be done (on which fiat no fee or reward is to be taken); whereupon (the fiat having been served on the solicitor to the Treasury), an answer, plea, or demurrer shall be made on behalf of the Crown, and the subsequent proceedings be assimilated so far as practicable to the course of an ordinary action. And it is enacted, that, in cases in which a judgment of *amoveas manus* has heretofore been given on a petition of right, a judgment that the suppliant is entitled to the whole or some portion of the relief sought by his petition under this Act, or to such other relief, and in such terms and conditions as the court may think right, may be given instead, which shall have the same effect as such judgment of *amoveas manus* (*t*). Upon any petition of right under this Act, it is also provided, that *costs* shall be payable both to and by the Crown; subject to the same rules, so far as practicable, as obtain in proceedings between subject and subject (*u*). It is, however, provided, that nothing in the Act shall prevent any suppliant from proceeding as before it passed.

(*s*) Finch, L. 459.

(*t*) 23 & 24 Vict. c. 34, ss. 9, 10.

(*u*) Sect. 12. As to the *certificate* for costs against the Crown, given by the judge dealing with the petition,

to the Commissioners of the Treasury (or in matters affecting the crown in its private capacity, to the Treasurer of the Household,) see sects. 13, 14, et sched. No. 5.

II. The method of redressing such injuries as the Crown may receive from the subject (*u*), are—

1. [By such usual common law actions, as are consistent with the royal prerogative and dignity. As the sovereign, by reason of his legal ubiquity (*x*), cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes the dispossession of the plaintiff, such as an ejectment (*y*): but the Sovereign may bring a *quare impedit* (*z*), which always supposes the complainant to be seized or possessed of the advowson.] So too [the sovereign may bring an action of trespass for taking away his goods, for breaking his close, or other injury done to his soil or possession (*a*): but such actions (though in strictness maintainable)] are not usually brought at the suit of the Crown. [It would be equally tedious and difficult to run through every minute distinction, that might be gleaned from our books with regard to this matter (*b*); nor is it in any degree necessary, as much easier and more effectual remedies are usually obtained by such prerogative modes of process as are peculiarly confined to the Crown.

2. [Amongst these prerogative methods, is that of *inquisition* (or *inquest*), of office (*c*): which is an inquiry made by the sovereign's officer, his sheriff, coroner, or escheator, either *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any

(*u*) Under this head Blackstone (vol. iii. pp. 262, et seq.) comprises the subjects of *quo warranto* and *mandamus*. But these are practically in the nature of remedies at the suit of a private litigant; and in the arrangement of the present work it has been deemed expedient so to class them. Vide sup. pp. 5, 14.

(*x*) Vide sup. vol. ii. p. 528.

(*y*) Bro. Ab. tit. Prerog. 89. As to an ejectment, vide sup. vol. iii. pp. 476, 509, 710, et seq.

(*z*) As to *quare impedit*, vide sup. vol. iii. pp. 476, 514, 701, et seq.

(*a*) Bro. Abr. tit. Prerog. 130; F. N. B. 90; Y. B. 4 Hen. 4, pl. 4.

(*b*) Some of these, are discussed in the case of Attorney-General v. Lord Churchill, 8 Mee. & W. 172.

(*c*) As to the form of, and proceedings in, an inquisition of office, see 12 & 13 Vict. c. 109, s. 30, et seq. See also Dean v. Reginam, 15 Mee. & W. 475.

[matter that entitles the Crown to the possession of lands or tenements, goods or chattels (*d*); and this is done by a jury of no determinate number—being either twelve, or less, or more. As to inquire whether the Crown's tenant for life died seised, whereby the reversion accrues to the sovereign—whether A., who held immediately of the Crown, died without heir; in which case the land must belong to the sovereign by escheat—whether B. be attainted of treason, whereby his estate is forfeited to the Crown—whether C., who has purchased lands, be an alien, which is another cause of forfeiture—whether D. be an idiot *a nativitate*, and therefore, together with his lands, appertains to the custody of the sovereign; and other questions of like import, concerning both the circumstances of the tenant, and the value or identity of the lands. These inquests of office were more frequently in practice during the continuance of the military tenures amongst us than at present;] for then, upon the death of any tenant of the Crown, such inquest was held, [called an *inquisitio post mortem*, to inquire of what lands he died seised, who was his heir, and of what age, in order to entitle the king to his marriage, wardship, relief, *primer seisin*, or other advantage, as the circumstances of the case might turn out (*e*). To superintend and regulate these inquiries, the court of wards and liveries was instituted by statute 32 Hen. VIII. c. 46; which was abolished at the restoration of King Charles the second, together with the oppressive tenures upon which it was founded. With regard to other matters, the inquests of office still remain in force, and are taken upon proper occasions; being extended not only to lands, but also to goods and chattels personal,—as in the case of wreck, treasure trove and the like; and especially as to forfeitures for offences.] For every jury which tries a man for treason or felony,—and every coroner's inquest that sits upon a dead body,—is not only with regard to lands,

(*d*) Finch, L. 323, 425.

(*e*) Vide sup. vol. I. p. 193 et seq.

but also as to goods and chattels, [in all respects an inquest of office ;] and if they find treason or felony to have been committed by the party tried, or by any one in respect of the body lying dead, [the sovereign is thereupon, by virtue of this *office found*, entitled to have his forfeitures (*g*).]

These inquests of office were devised by law, as an authentic means to give the sovereign his right by solemn matter of record.] For [it is a part of the liberties of England, and greatly for the safety of the subject, that the sovereign may not enter upon or seize any man's possessions, upon bare surmises, without the intervention of a jury (*h*).] And it is [by the statute 18 Hen. VI. c. 6, enacted, that all letters patent, or grants of lands and tenements, before office found or returned into the Exchequer, shall be void. And by the Bill of Rights at the Revolution, (1 W. & M. st. 2, c. 2,) it is declared, that all grants and promises of fines and forfeitures of particular persons before conviction, (which is here the inquest of office,) are illegal and void ; which indeed was the law of the land, in the reign of Edward the third (*i*).]

[There are many cases, however, both as regards lands and chattels, in which the Crown is entitled without office found (*h*):] though it has been frequent even in such cases to have an inquest, for the better instruction of the officer before seizure : and to protect the subject from the adoption of hasty measures (*l*). As to chattels indeed, the general rule seems to be, that the Crown is entitled without office or other matter of record (*m*) ; and it is [particularly enacted by the statute 33 Hen. VIII. c. 20, that, in case of attainder for treason, the king shall have the forfeiture instantly without any inquisition of office.] And though the rule formerly

(*g*) If the death has been occasioned by a *felo de se*, the forfeiture to the Crown accrues ; as to which, and the inquest in such case, see 1 Saund. 275, 362.

(*h*) *Sheffield v. Ratcliffe*, Hob. 347 ; *Gilb. Hist. Ex.* 132.

(*i*) 2 Inst. 48.

(*k*) 4 Rep. 58 a.

(*l*) *Chit. Prerog.* 247, cites *Gilb. Exch.* 109, 13, 4 ; 16 *Vin. Ab.* 79, *Office, B.* ; 12 *East*, 102.

(*m*) *Chit. Prerog.* ubi sup.

was (*n*), that where a common person cannot have possession without entry, the sovereign cannot have it without an office, yet now it is otherwise; for by 22 & 23 Vict. c. 21, s. 25, it is enacted that when any right of re-entry upon lands or other hereditaments shall have accrued to the Crown, such right may be exercised or enforced without any inquisition taken or office found, or any actual re-entry being made on the premises. As to the effect of these inquests when taken, it may be laid down as generally true with regard to real property, that if an office be found for the sovereign, and the land be not held at the time by a stranger, it puts the Crown into immediate possession, without the trouble of a formal entry; and the Crown shall receive all the mesne or intermediate profits from the time that its title accrued (*o*). [As on the other hand by the *Articuli super chartas* (*p*), if the king's escheator or sheriff seize lands into the king's hand, without cause, upon taking them out of the king's hand again, the party shall have the mesne profits restored to him.]

In order to avoid the possession of the Crown acquired by the finding of such office, the subject may have his petition of right, or *monstrans de droit*, or he may traverse the inquisition,—according to the distinctions which we have already had occasion to explain (*q*).

3. Upon all debts of record due to the Crown, the sovereign has his peculiar remedy by writ of *extent* (*r*); which differs in this respect from an ordinary writ of execution at

(*n*) See Chit. Prerog. 249

(*o*) 3 Bl. Com. 260, cites Finch, L. 325, 326.

(*p*) 28 Edw. 1, st. 3, c. 19.

(*q*) Vide sup. pp. 69, 70.

(*r*) With respect to debts *not* of record, viz. simple contract debts, and bonds, and other specialties, (not falling within the stat. of 33 Hen. 8, to be presently mentioned in the text,)—no extent can be

granted on these, till a commission has first issued, under which an inquisition is taken to find the debt; and when such debt is returned on the inquisition, it becomes a debt on record, on which an extent may issue. (Chit. Prerog. 267.) As to the proceedings on such inquisition, see *R. v. Ryle*, 9 Mec. & W. 227.

suit of the subject, that under it the body, lands and goods of the debtor may be all taken at once, in order to compel the payment of the debt (*r*). And this proceeding is called an *extent*, from the words of the writ; which directs the sheriff to cause the lands, goods and chattels to be appraised at their full, or extended, value (*extendi facias*), before they are delivered to satisfy the debt. A debt of record as regards the Crown, is subject in general to the same definition, as in the case where the party to whom it is due is a subject (*s*). But there are several instances in which a debt is so ranked in favour of the Crown, by way of exception from the general rule, and by force of its special prerogative. For, first, it having been provided in the case of debts acknowledged on statute merchant or statute staple, that, upon forfeiture of these, the body, lands and goods might be taken at once in execution (*t*),—it was by 33 Hen. VIII. c. 39, afterwards enacted, among other provisions, that [all obligations made to the king shall have the same force, and of consequence the same remedy, to recover them as a statute staple (*u*).] Moreover, by statute 13 Eliz. c. 4, the lands of all such treasurers, and other officers as therein mentioned, shall be liable to the Crown debts due on their accounts, in the same manner as if on the day they first became officers or accountants, respectively, they had stood bound by writing obligatory having the effect of statute staple (*x*). And by 43 Geo. III. c. 99,

(*r*) See 3 Rep. 12 b; Gilb. Ex. 7; 3 Bl. Com. 420; 2 Saund. by Wms. 70. It does not, however, appear to be usual in practice, to seize the *body* of the debtor. See Chit. Prerog. 282; *Rex v. Plaw*, 3 Price, 94. As to the writ of extent, see also Williams on Real Property, p. 76, 5th ed.

(*s*) Vide sup. vol. II. p. 142.

(*t*) Vide sup. vol. I. p. 314; 2 Saund. 69 b.

(*u*) 3 Bl. Com. 420; *R. v. Lamb*, 3 Price, 543. Whether the general right of the Crown to have execution by extent upon all debts of record, rests upon the provisions of this statute, or on the common law, has been questioned. See Bl. Com. (ubi sup.); 3 Rep. 12; Gilb. Ex. 7.

(*x*) *R. v. Rawlings*, 12 Price, 834; *R. v. Fernandez*, *ibid.* 862.

s. 41, and 5 & 6 Will. IV. c. 20, s. 13, duties detained in the hands of tax collectors may be recovered as a debt upon record to the Crown, with all costs and charges (*y*).

An extent for recovery of the Crown's debt issues from the Court of Exchequer (*z*), as being the court principally presiding over all matters relating to the royal revenue (*a*). And it directs the sheriff to take an inquisition (or inquest of office) on the oaths of lawful men, to ascertain the lands, goods and debts of the defendant; and to seize the same into the hands of the sovereign, &c. It is, however, in general, necessary that the extent should be preceded by a *scire facias* (*b*), in order to bring the defendant into court, and afford him an opportunity of showing that it ought not to issue (*c*); though in cases where there is danger of the debt being lost, a baron of the Exchequer may authorize an immediate extent, (*i. e.* an extent without a *scire facias*,) upon affidavit of the circumstances (*d*). The writ having issued, and the inquisition taken, and the seizure made under it by the sheriff being returned into court, the defendant, if he means to dispute the debt,—or any third person, who thinks proper to advance a claim to the property set forth in the inquisition,—must enter an appearance in the Court of Exchequer for that purpose; when he will be permitted to plead to the extent (*f*). As to the *defendant*, he is allowed by statute 33 Hen. VIII. c. 39, s. 79, to allege or show, in such pleading, any good and sufficient “matter in law, reason, or good conscience,” in bar or discharge of the

(*y*) R. v. Wrangham, 1 Tyrw. 383.

(*z*) By 5 & 6 Vict. c. 86, s. 8, all extents, &c. may bear *teste* and be made returnable on any day certain in term or vacation; and claims to goods seized may be made in vacation, &c.

(*a*) Vide sup. vol. II. p. 548; vol. III. p. 402 et seq.

(*b*) Chit. Prerog. 271. As to *scire facias* generally, vide sup. vol. III.

p. 696. And as to *scire facias* at the suit of the Crown, see 12 & 13 Vict. c. 109.

(*c*) Chit. Prerog. 271.

(*d*) Ibid. 277.

(*f*) See 22 & 23 Vict. c. 21, s. 22, enacting that no pleading in proceedings on the revenue side of the Exchequer, shall be deemed insufficient for any defect in form, &c.

debt: but, as he is found by the inquisition itself to be the owner of the lands and chattels, it is unnecessary for him to claim in his pleading any property in them. If he succeeds in showing matter in bar or discharge of the Crown debt, his right to the property in question is of course incontestable(*g*). On the other hand, where a third party is let in to plead to the extent, he is not entitled to deny the debt due from the defendant to the Crown: but, by his plea, he must show a title in himself to the lands or chattels; and either traverse, or confess and avoid, the title of the Crown,—or, what is the same thing, that of the debtor against whom the writ issued(*h*). Issue of law or fact being joined, it is decided either on demurrer, or by trial by jury, pursuant in general to the ordinary course of practice in suits between subject and subject(*i*); and is followed by judgment. Which, when given for the Crown, is that the subject takes nothing by his traverse or plea; if given either for the debtor, or the third party let in to plead, is an award of *amoveas manus*(*k*). Upon this judgment, error also lies, provided the consent of the attorney-general to that proceeding, be previously obtained(*l*).

With respect to the *effect* of an extent, the lands of a Crown debtor are bound, in general, from the time when the debt became one of record(*m*); which, in the case of such bonds as are mentioned in 33 Hen. VIII. c. 39, s. 50, is from the time the bonds are executed. However,

(*g*) Chit. Prerog. 367.

(*h*) Ibid. 368. As to the practice in such cases, see *R. v. Randall*, 5 Price, 576; *R. v. Lambton*, *ibid.* 421; *R. v. Soulby*, 1 Y. & G. 249.

(*i*) See 22 & 23 Vict. c. 21, s. 17, authorizing the judges to try such issues of fact on their several circuits, without commission from the revenue side of the Court of Exchequer.

(*k*) *See* Evans, 6 Price, 480.

(*l*) Chit. Prerog. 373. The property seized under an extent may, if the right of the Crown be established, be sold. Such sale, if of lands, is regulated by 25 Geo. 3, c. 35 (as to the effect of which, see *King Geo. III. v. De la Motte*, 2 H. & N. 589); if of chattels, it takes place under a writ of *venditioni exponas*.

(*m*) 2 Roll. Ab. 156, B. pl. 1.

even at common law, debts, (though not of record,) due from certain known public officers and accountants to the Crown, bound the debtor's *lands* from the time they accrued due; and the 13 Eliz. c. 4, extends the common law exception, by providing that arrearages due from tellers, receivers and such other officers as are mentioned therein, shall bind their lands from the time when they entered into the offices (*n*). As for the *goods* of the debtor, they are bound from the *teste* (or date) of the extent (*o*); and the rule seems to be the same as to any debts owing to him (*p*). It is also provided by 33 Hen. VIII. c. 39, s. 74, that [the Crown's debt shall, in suing out execution, be preferred to that of every other creditor, who hath not obtained judgment before the Crown commenced its suit (*q*).] On the other hand, however, it is enacted by 2 & 3 Vict. c. 11, that no debt due to the Crown, on judgment, statute, recognizance, inquisition of debt, obligation, or specialty,—nor any acceptance of office thereafter accepted by tellers, receivers, &c.,—shall affect any lands, tenements or hereditaments as to purchasers or mortgagees, unless and until such memorandum or minute thereof, as in the Act provided, shall be left with the senior Master of the Court of Common Pleas; who shall forthwith enter the particulars in a book to be intituled “The index to the debtors and accountants to the Crown.” And further, that whenever a *quietus* shall be obtained by a debtor or accountant to the Crown (*r*)—and an office copy thereof left with such Master, together with a cer-

(*n*) *Wilde v. Forte*, 4 Taunt. 334; *Chit. Prerog.* 294; 3 Bl. Com. 420. As to the estate of a *public accountant* sold under an extent, &c., see 1 & 2 Geo. 4, c. 121, s. 10.

(*o*) *Chit. Prerog.* 285; 1 Saund. by Wms. 219 g.

(*p*) *Ibid.* 304; *R. v. Lambton*, 5 Price, 428. As to the effect on partnership property, see *R. v. Saunder-*

son, *Wightw.* 50; *Shears v. Lord Advocate*, 6 Clarke & Fin. 180.

(*q*) As to the priority of the Crown in cases of extent, see *Edwards v. Reginam*, 9 Exch. 628.

(*r*) See also further provisions on this subject, contained in 18 & 19 Vict. c. 15, and 22 & 23 Vict. c. 35 s. 22; 23 & 24 Vict. c. 115.

tificate signed by the accountant-general, that the same may be registered,—that the Master shall forthwith enter the same in the said book accordingly. And also that it shall be lawful for the lords of the Treasury, (or any three of them,) by writing under their hands,—upon payment of such sums as they shall think fit to require into the receipt of her Majesty's exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the Crown, or upon such other terms as they may think proper,—to certify that any lands, tenements or hereditaments of any such Crown debtor or accountant shall be held by the purchaser or mortgagee, or intended purchaser or mortgagee thereof, wholly exonerated from all further claim of the Crown; or, in cases of leases for fines, to certify that the lessee shall hold the premises exonerated in like manner, without prejudice to the right of the Crown to the reversion upon such lease, and the rents and covenants reserved by the same: and that thereupon the same lands, tenements and hereditaments shall respectively be held exonerated as aforesaid (s).

Such is in general the state of the law relating to the principal kind of extent, called an extent *in chief*. Besides this, however, there is an extent *in aid*; which issues, not at the suit of the Crown, like an extent in chief, but at the suit or instance of the Crown debtor against a person indebted to the Crown debtor himself (t). And it is grounded on the Statute of Extent, 33 Hen. VIII. c. 39, and on the principle that the Crown is entitled to the debts due to its debtor. The writ sued out in this case, directs the sheriff (without mention of body, goods or lands) to seize the debts, specialties and sums of money due to the Crown debtor: the effect of which is to cause

(s) See also 25 & 26 Vict. c. 53, ss. 20, 114, as to exonerating lands registered under that Act, from claims of the Crown.

(t) As to the persons entitled to

extents in aid, see *R. v. Gibbs*, 7 Price, 633; *R. v. Tarleton*, 9 Price, 647; *R. v. Kynaston*, 11 Price, 598.

an inquisition and seizure to be made of such debts for the Crown's use (*u*); though by consent of the Crown the produce of the extent may be paid over to the Crown debtor, (or prosecutor,) himself. This practice of issuing extents in aid, was at one time carried to so great a length, (particularly by issuing them for larger sums than were in fact due to the Crown from the prosecutor,) as to enable Crown debtors in almost every case to convert to their own benefit a species of execution, properly belonging to the Crown; and thereby to obtain an undue preference as regards other creditors; but the resort to extents in aid is now subjected, by 57 Geo. III. c. 117, to restraints which tend to the rectification of this abuse (*x*). There is also a special writ of extent, which is issued in the event of the death of a Crown debtor; and is called a *diem clausit extremum*, because it recites the death of the party (*y*). By this writ the sheriff is commanded to inquire by a jury, when and where the Crown debtor died; and what chattels, debts and land he had at the time of his decease; and to take and seize them into the Crown's hands.

As to the course of proceeding and law relative to an extent in aid, and *diem clausit extremum*, in any particular not above specified,—it is in general similar to that which prevails upon an extent in ordinary cases.

(*u*) As to what may be seized, see *R. v. Lushington*, 1 Price, 94; *R. v. Hunter*, 4 Price, 258; *R. v. Lambton*, 5 Price, 428.

(*x*) And see a Rule of the Exchequer (22 June, 1822), that no fiat for an extent in aid shall be issued, without affidavit that there will otherwise be danger of the debt being lost to the Crown. We may remark here, that there is also an extent in chief in the second degree, which differs from the extent in aid in this— that the first is a proceeding by the Crown *proprio motu* against the debtor

of him against whom an extent in chief has issued; the latter is where the extent is issued at the instance of a Crown debtor against his debtor, to aid his payment of the Crown debt. The stat. 57 Geo. 3, c. 117, does not apply to extents in chief in the second degree. (See *R. v. Shackle*, 11 Price, 772; *Reg. v. Adams*, 2 Exch. 299.)

(*y*) See *Ex parte Hipplesley*, 2 Price, 379; *R. v. Hodge*, 12 Price, 537; *R. v. Hassell*, M'Clel. 105; *R. v. Lord Crewe*, 5 Dowl. 158.

4. [When the Crown hath unadvisedly granted any thing by letters patent, which ought not to be granted (*z*); or where the patentee hath done some act that amounts to a forfeiture of the grant; the remedy to repeal the patent is by writ of *scire facias*, issued on the common law side of the Court of Chancery (*a*). This may be brought either on the part of the Crown, in order to resume the thing granted: or, if the grant be injurious to a subject, the Crown is bound of right to permit him, (upon his petition,) to use the royal name for repealing the patent, in a *scire facias* (*b*). And so also, if, upon office untruly found for the Crown, it grants the land over to another,—he who is grieved thereby, and traverses the office itself, is entitled before issue joined to a *scire facias* against the patentee, in order to avoid the grant (*c*).

• 5. An *information* on behalf of the Crown, filed in the Court of Exchequer by the attorney-general, is a method of suit for recovering money or other chattels; or for obtaining satisfaction in damages, for any personal wrong committed in the lands or other possessions of the Crown (*d*). It differs from an information filed in the Court of Queen's Bench,—of which we shall treat in the next Book (*e*),—in that *this* is instituted to redress a private wrong by which the property of the Crown is affected: *that* is calculated to punish some public wrong or heinous misdemeanor in the defendant. It is grounded on no writ under seal, but merely on the intimation of the Crown's officer, the attorney-general, who “gives the Court to understand and be informed of” the matter in question; upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are

(*z*) Vide sup. vol. II. p. 33.

(*a*) 3 Lev. 220; 4 Inst. 88.

(*b*) R. v. Butler, 2 Vent. 344.

(*c*) Bro. Ab. tit. Scire Facias, 69, 185.

(*d*) Yelverton's case, Moor, 375.

(*e*) Vide post, bk. VI. c. XVIII.

[those of intrusion (*f*) and of debt (*g*): of *intrusion*, for any trespass committed on the lands of the Crown (*h*),—as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber and the like,—and of *debt*, for monies due] to the Crown [upon the breach of a penal statute (*i*). This is most commonly used to recover forfeitures occasioned, by transgressing those laws which are enacted for the establishment and support of the revenue; others, which regard mere matters of police and public convenience, being usually left to be enforced by common informers, in *qui tam* actions (*k*). But after the attorney-general has informed upon a breach of the penal law, no other information can be received (*l*). There is also an information *in rem*, when any goods are supposed to become the property of the Crown, and no man appears to claim them or to dispute its title;—as antiently in the case of treasure-trove, wrecks, waifs, and estrays, seized] by the Crown's officer for its use. [Upon such seizure an information was usually filed in the Exchequer, and thereupon a proclamation was made for the owner, (if any,) to come in and claim the effects: and at the same time there issued a commission of *appraisal* to value the goods in the officer's hands; after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of the Crown (*m*). And when in

(*f*) See 4 Rep. 58 a; *Attorney-General v. Parsons*, 2 M. & W. 23; *Attorney-General v. Hill*, *ibid.* 160.

(*g*) See *Attorney-General v. Sewell*, 4 Mee. & W. 77.

(*h*) *Nanning v. Rowland ap. Ellis*, Cro. Jac. 212; Lord Vaux's case, 1 Leon. 49. In this proceeding the Crown has not a right to lay the venue in any county it pleases, as it has in personal actions. (*Attorney-General v. Lord Churchill*, 8 Mee. & W. 171.) As to information of

intrusion in respect of a royal forest, see *Attorney-General v. Hallett*, 1 Exch. 211.

(*i*) See 41 Geo. 3, c. 90, as to enforcing, in Ireland, payment of Crown debts recovered in England, and *vice versâ*.

(*k*) As to proceedings on penal statutes, vide sup. vol. III. pp. 551, 552, 575.

(*l*) Hard. 201.

(*m*) Gilb. Hist. Exch. c. 13.

[later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by Act of Parliament for transgressions against the laws of the customs and excise,—the same process was adopted in order to secure such forfeited goods to the public use, though the offender himself had escaped the reach of justice.]

Finally, we may remark, that in all informations and other legal proceedings by or on behalf of the Crown in matters relating to the *public revenue*, the costs are now, by 18 & 19 Vict. c. 90, ss. 1, 2, placed upon the same footing as in ordinary actions between subject and subject (*n*); but that, as the general rule, as it stands independently of this statute, the Crown neither pays nor receives costs (*o*).

[We have now gone through the whole circle of civil injuries, and the redress which the laws of England have anxiously provided for each. In which the student cannot but observe, that the main difficulty which attends their discussion, arises from their great variety; which is apt at our first acquaintance to breed confusion of ideas, and a kind of distraction in the memory. A difficulty not a little increased by the very immethodical arrangement in which they are delivered to us by our antient writers, and the numerous terms of art in which the language of our ances-

(*n*) By 25 Vict. c. 14, the provisions of this statute are extended to the *Isle of Man*. It may be here remarked that by 18 & 19 Vict. c. 90, s. 3, and 22 & 23 Vict. c. 21, ss. 26, 27, the Barons of the Exchequer are empowered to make general rules for the regulation of the pleading and practice in informations and other proceedings by or on behalf of the Crown, with a view to their assimilation, as nearly as possible,

to the pleading and practice between subject and subject.

(*o*) See 24 Hen. 8, c. 8; 3 Bl. Com. 400; 25 Geo. 3, c. 35; Attorney-General v. Shillibeer, 4 Exch. 606; The Queen v. Beadle, 7 Ell. & Bl. 492. In Blackstone's opinion, (vol. iii. p. 400,) "it seems reasonable to suppose, that a queen consort participates in this privilege of the Crown as regards costs."

[tors has obscured them.] For [terms of art, there will unavoidably be in all sciences; the easy conception and thorough comprehension of which must depend upon frequent and familiar use; and the more subdivided any branch of science is, the more terms must be used to express the nature of these several subdivisions, and mark out with sufficient precision the ideas they are meant to convey. But this difficulty, however great it may appear at first view, will shrink to nothing upon a nearer and more frequent approach; and indeed be rather advantageous than of any disservice, by imprinting on the mind a clear and distinct notion of the several remedies. And, such as it is, it arises principally from the excellence of our English laws; which apply their redress exactly to the circumstances of the injury, and do not furnish one and the same action for different wrongs, which are impossible to be brought within one and the same description; whereby every man knows what satisfaction he is entitled to expect from the courts of justice; and as little as possible is left in the breast of the judges, whom the law appoints to administer, and not to prescribe, the remedy.]

BOOK VI.

OF CRIMES.

CHAPTER I.

OF THE NATURE OF CRIMES AND THEIR PUNISHMENTS.

WE are now arrived at the sixth and last branch of the Commentaries; which treats of *public wrongs*, or *crimes*. For it will be remembered that wrongs were divided into two species; the one *private*, and the other *public* (*a*). Private wrongs, otherwise termed *civil injuries*, were the subject of the preceding Book. We are now, therefore, lastly, to proceed to the consideration of public wrongs or crimes: in pursuit of which we shall consider, [in the first place, the general nature of crimes and punishments; secondly, the persons capable of committing crimes; thirdly, their several degrees of guilt as principals or accessories; fourthly, the several species of crimes, with the punishment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and, sixthly, the method of inflicting those punishments which the law has annexed to each crime respectively.

First, as to the general nature of crimes and their punishment: the discussion and admeasurement of which forms,

(a) Vide sup. vol. i. p. 141.

[in every country, the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the "*pleas of the crown*," so called because the sovereign, —in whom centres the majesty of the whole community,— is supposed by the law to be the person injured] by every wrong done to that community; [and is therefore, in all cases, the proper prosecutor for every such offence.

The knowledge of this branch of jurisprudence, which teaches the nature, extent, and degrees, of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state. For, as a very great master of the Crown law (*b*) has observed upon a similar occasion, no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events which the compass of a day may bring forth, will teach us (upon a moment's reflection), that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

In proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly forming and enforcing it. It should be founded on principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes, (provided there be no transgression of these eternal boundaries,) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the State which it is meant to govern.] And yet (remarks Blackstone) either from [a want of

(*b*) Sir Michael Foster, pref. to Rep.

[attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition and revenge; or from retaining the discordant political regulations which successive conquerors or factions have established in the various revolutions of government; or from giving a lasting efficacy to sanctions that were intended to be temporary, and made, (as Lord Bacon expresses it,) merely upon the spur of the occasion; or, lastly, from too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offence;—from some or from all of these causes it hath happened, that the criminal law is, in every country of Europe, more rude and imperfect than the civil.] And [even with us in England, where our Crown law is, with justice, supposed to be more nearly advanced to perfection; where crimes are more accurately defined and penalties less uncertain and arbitrary; where all our trials are in the face of the world; where torture is unknown, and every delinquent is judged by such of his equals against whom he can form no exception, nor even a personal dislike:—we shall occasionally find room to remark some particulars that seem to want revision or amendment(c).] The justice of these complaints has

(c) 4 Bl. Com. p. 3. Blackstone adds, that if bills, introductory of new penal enactments, were first referred to some of the learned judges before they were entertained in parliament, it would not have been possible “that in the eighteenth century it could ever have been made a capital crime to break down, however maliciously, the mound of a fish pond whereby any fish shall escape; or to cut down a cherry-tree in an orchard; as provided respectively by stat. 9 Geo. 1, c. 22; 31 Geo. 2, c. 42. And “were even a committee appointed

“but once in 100 years to revise the criminal law, it could not have continued to this hour a capital felony to be seen for one month in the company of persons who called themselves, or are called, Egyptians; as provided by 1 Ph. & M. c. 4, and 5 Eliz. c. 20.” It is scarcely necessary to remark, that all these sanguinary laws are now repealed. As to the two first mentioned offences the repeal is by 1 Geo. 4, c. 44, and 7 & 8 Geo. 4, c. 30, ss. 15, 19; as to the last, by 23 Geo. 3, c. 51, and 1 Geo. 4, c. 116.

been strikingly illustrated by the many signal reforms in the criminal law, which, since the time of Blackstone, the legislature has found reason to introduce: and even now, no candid commentator on our laws can pronounce a quite unmixed encomium on this part of our juridical system. We shall proceed now to consider, in the first place, the general nature of crimes; and this as regards, first, the crime itself; and, secondly, the punishment.

I. A crime is the violation of a right; when considered in reference to the evil tendency of such violation, as regards the community at large (*d*).

[The distinction of public wrongs from private—of crimes from civil injuries—seems upon examination principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are] a violation of the same rights, considered in reference to their effect on the community in its aggregate capacity (*e*). [As if I detain a field from another man to which the law has given him a right,—this is a civil injury and not a crime: for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land. But treason, murder and robbery, are properly ranked among crimes;

(*d*) The definition of Blackstone (vol. iv. p. 5), is as follows: "A crime or misdemeanor is an act committed or omitted, in violation of a public law either forbidding or commanding it." But this scarcely points out the difference between a crime and a civil injury.

(*e*) The expression of Blackstone (*ubi sup.*) is, "A breach and violation of the public rights and duties due to the whole community, considered as a community in its social

"and aggregate capacity." We are thus presented with another definition of crime; but it is not more satisfactory than the first, for it merely raises the question of what is meant by "public rights due to the community." If the expression is intended to exclude *private* rights due to the individual, the definition seems wrong; for a violation of such rights as these clearly amounts to a crime; as in the case of a murder or battery.

[since, besides the injury done to individuals, they strike at the very being of society ; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity. In all cases, crime includes an injury : every public offence is also a public wrong, and somewhat more ; it affects the individual, and it likewise affects the community. Thus treason in imagining the sovereign's death, involves in it conspiracy against an individual, which is also a civil injury ; but as this species of treason in its consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society,—this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual : but the law of society considers principally the loss which the State sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view : it is an injury to *private* property ; but were that all, a civil satisfaction in damages might atone for it : the *public* mischief is the thing for the prevention of which our laws have made it a] felonious offence (*g*). [In these gross and atrocious injuries, the private wrong is swallowed up in the public. We seldom hear any mention made of satisfaction to the individual, the satisfaction to the community being so very great (*h*). And indeed as the public crime is not otherwise avenged than by forfeiture of life,] or liberty, [or property, it is,] in many instances, [impossible afterwards to make any reparation for the private wrong ; which can only be had from the body,] lands, [or goods of the aggressor. But there are crimes of an inferior nature, in which the public

(*g*) The expression in Blackstone is “a *capital* offence ;” but robbery is not now capital, even when attended with wounding, &c., although in such last case it was very recently otherwise. (See 7 Will. 4 & 1 Vict. c. 87, s. 3, repealed by 24 & 25 Vict.

c. 95 ; 24 & 25 Vict. c. 43 ; et post, c. 5.)

(*h*) There still exists, however, a remedy for the private wrong ; even in cases of felony, it is only *suspended* during the prosecution for the crime.

[punishment is not so severe; and herein the distinction of crimes from civil injuries is very apparent. For instance, in the case of battery or beating another, the aggressor may be indicted for this, at the suit of the Crown, for disturbing the public peace, and be punished criminally by fine and imprisonment: and the party beaten, may also have his private remedy by action of trespass, for the injury which he in particular sustains; and recover a civil satisfaction in damages. So also in case of a public nuisance,—as digging a ditch across a highway—this is punishable by indictment as a common offence to the whole kingdom and all the king's subjects; but if any individual sustains any special damage thereby,—as laming his horse, breaking his carriage, or the like,—the offender may be compelled to make ample satisfaction, as well for the private injury as for the public wrong.

Upon the whole we may observe, that, in taking cognizance of all wrongs or unlawful acts, the law has a double view, viz. not only to redress the party injured, by either restoring to him his right (if possible), or by giving him an equivalent,—the manner of which was the object of our inquiries in the fifth Book of these Commentaries; but also to procure to the public the benefit of society, by preventing or punishing every breach or violation of those laws which the sovereign power has thought proper to establish, for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, are to be considered in the present Book.]

In ordinary language we understand, when we speak of crimes, such only as are subjects for *indictment*,—a proceeding of which we shall have occasion to speak hereafter. For such breaches of law as are not the subjects for indictment, and are punishable merely by a pecuniary penalty recoverable on a summary conviction before a justice of the peace, are not usually designated as crimes, but by the more general term of offences. Crimes thus understood con-

sist either of *misdemeanors* or *felonies* (*i*). The term *misdemeanor* (*h*) is, properly speaking, synonymous with that of crime; though, in common usage, the word is made to denote such crimes as amount not to *felonies*. Into the nature and meaning of the latter denomination, it will be expedient to enter a little more at large.

[Felony, in the general acceptation of our English law, comprises every species of crime, which occasioned at common law the forfeiture of lands and goods. Treason itself, says Sir Edward Coke (*l*), was antiently comprised under the name of felony; and in confirmation of this we may observe that the statute of treasons, (25 Edw. III. c. 2,) speaking of some dubious crimes, directs a reference to parliament, that it may be there adjudged “whether they be treason or *other* felony.” All treasons, therefore, strictly speaking, are felonies, though all felonies are not treason.]

To explain this matter a little further: [the word *felony*, or *felonia*, is of undoubted feudal original, being frequently to be met with in the books of feuds, &c.; but the derivation of it has much puzzled the juridical lexicographers Prateus, Calvinus, and the rest; some deriving it from the Greek *φηλος*, an impostor or deceiver; others from the Latin *fallo*, *fefelli*, to countenance which they would have called it *fallonia*. Sir E. Coke, as his manner is, has given us a still stranger etymology (*m*),—that it is *crimen animo felleo perpetratum*, with a bitter or gallish inclination. But all of them agree in the description that

(*i*) In order to prevent any failure of justice by reason of this technical distinction, it has been provided that if upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor.

(14 & 15 Vict. c. 100, s. 12.)

(*h*) As to the technical force of the word “misdemeanor” in an indictment, see *R. v. Powell*, 2 B. & Ad. 75; *Ryalls v. The Queen*, 11 Q. B. 794.

(*l*) 3 Inst. 15.

(*m*) 1 Inst. 391.

[it is such a crime, as occasions the forfeiture of all the offender's lands or goods. And this,] as Blackstone observes, [gives great probability to Sir II. Spelman's Teutonic or German derivation of it (n); in which language indeed, (as the word is clearly of feudal origin,) we ought rather to look for its signification than among the Greeks and Romans.

Fe-lon, then, according to Spelman, is derived from two northern words: *fē*, which signifies, we well know, the fief, feud, or beneficiary estate; and *lon*, which signifies price or value. Felony (o) is therefore the same as *pretium feudi*; the consideration for which a man gives up his fief; as we say, in common speech, such an act is as much as your life or estate is worth. In this sense it will clearly signify the feudal forfeiture, or act by which an estate is forfeited or escheats to the lord.

To confirm this we may observe, that it is in this sense of forfeiture to the lord, that the feudal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeiture of copyhold estates (p), are styled *felonia* in the feudal law: "*scilicet per quas feodum amittitur (q).*" As "*si domino deservire noluerit (r); si per annum et diem cessaverit in petendâ investiturâ (s); si dominum ejuraverit, i. e. negaverit se a domino feudum habere (t); si a domino, in jus eum vocante, ter citatus non compgruerit (u):*" all these, with many others, are still causes of forfeiture in our copyhold estates; and were denominated felonies, by the feudal constitutions. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures; as assaulting

(n) 4 Bl. Com. 95, cites Gloss. tit. Felon.

(o) As to the technical force of the word "felony" in an indictment, see *Campbell v. The Queen*, 11 Q. B. 799.

(p) Vide sup. vol. i. p. 640.

(q) Feud. l. ii. t. 16.

(r) Ib. l. i. t. 21.

(s) Ib. l. ii. t. 24.

(t) Ib. t. 26, s. 3, t. 34.

(u) Ib. t. 22.

[or beating the lord (*y*), or vitiating his wife or daughter, "*si dominum cucurbitaverit, i. e. cum uxore ejus concubuerit (z)*": all these are esteemed felonies, and the latter is expressly so denominated: *si fecerit feloniam, dominum forte cucurbitando(a)*." And as these contempts or smaller offences were felonies or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. On the other hand, the lord might be guilty of felony, or forfeit his seigniorship to the vassal, by the same acts as the vassal would have forfeited his feud to the lord: "*si dominus commiserit feloniam, per quam vasallus amitteret feudum si eam commiserit in dominum, feudi proprietatem etiam dominus perdere debet(b)*." One instance given of this sort of felony in the lord, is beating the servant of his vassal, so that he loses his service; which seems merely in the nature of a civil injury, so far as it respects the vassal. And all these felonies were to be determined "*per laudamentum sive judicium parium suorum*" in the lord's court; as with us forfeitures of copyhold lands, are presentable by the homage in the court baron.

Felony, and the act of forfeiture to the lord, being thus synonymous terms in the feudal law, we may easily trace the reason why,—upon the introduction of that law into England,—those crimes which induced such forfeiture or escheat of lands,—and, by a small deflexion from the original sense, such as induced the forfeiture of goods also,—were denominated felonies. • Thus it was said that suicide, robbery, and rape, were felonies; i. e. the consequence of such crimes was forfeiture; till, by long use, we began to signify by the term of felony the actual crime committed, and not the penal consequence.

Hence it follows, that capital punishment does by no means enter into the true idea and definition of felony (*c*).

(*y*) Feud. l. ii. t. 24, s. 2.

c. 22.

(*z*) Ib. l. i. t. 5.

(*b*) Feud. l. ii. t. 26, 47.

(*a*) Ib. l. ii. t. 38; Britton, l. i.

(*c*) At common law, however, the

[Felony may be without inflicting capital punishment, as in the cases instanced of self-murder,] manslaughter, and larceny; and in the case of many other offences made felonies by statute. And at a period of our law when punishment by death was more frequent, instances are not wanting where an offence was capital, though (as it worked no forfeiture of land or goods,) it was no *felony*, as [in the case of heresy, by the common law] (*d*). And of the same nature, was the antient [punishment for standing mute without pleading to an indictment: which at the common law was capital, but without any forfeiture; and therefore such standing mute, was no felony. In short the true criterion of felony is forfeiture;] and accordingly, to this day, all felonies, punishable with death, occasion a forfeiture to a greater or less extent of the lands of the offender, and the total forfeiture of his goods and chattels; and even such as are not so punishable, the total forfeiture of his goods and chattels (*e*).

II. The nature of crimes in general being thus ascertained and distinguished, we proceed in the next place to consider the [general nature of *punishments*; which are evils or inconveniences consequent on crimes and misdemeanors; being devised, denounced, and inflicted by human laws in consequence of disobedience or misbehaviour in those to regulate whose conduct such laws were respectively made. And herein we will briefly consider the *power*, the *end* and the *measure* of human punishments.

idea of felony was in general connected with that of capital punishment; "and therefore," says Blackstone (vol. iv. p. 98), "if a statute makes any new offence felony, the law implies that it shall be punished with death, viz. by hanging, as well as with forfeiture, unless the offender prays the benefit of clergy, which all felons are entitled once

"to have, provided the same is not expressly taken away by statute." As to benefit of clergy (now abolished), vide post, c. XXIII.

(*d*) As to heresy, vide sup. vol. III, p. 48.

(*e*) See the law as to forfeiture on felony, further explained, post, c. XXIII.

[1. As to the *power* of human punishment; or the right of the temporal legislator, to inflict discretionary penalties for crimes and misdemeanors (*g*). It is clear that the right of punishing crimes against the law of nature,—as murder and the like,—is in a state of mere nature vested in every individual. For it must be vested in *somebody*, otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution; and if that power is vested in any *one*, it must also be vested in *all* mankind, since all are by nature equal. Whereof the first murderer Cain, was so sensible, that we find him expressing his apprehensions, that *whoever* should find him would slay him (*h*). In a state of society, this right is transferred from individuals to the sovereign power: whereby men are prevented from being judges in their own causes, which is one of the evils which civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community; and to this precedent natural power of individuals, must be referred that right which some have argued to belong to every state (*i*), of punishing not only their own subjects, but also foreign ambassadors, even with death itself, in case they have offended—not indeed against the municipal laws of the country, but—against the divine laws] or laws of nature, [and have become liable thereby to forfeit their lives for their guilt.

As to offences merely against the laws of society, which are only *mala prohibita* and not *mala in se* (*h*), the temporal magistrate is also empowered to inflict coercive pe-

(*g*) See Grotius, De J. B. et P. l. 2, c. 20; Puff. L. of Nat. and N. b. 8, c. 3.

(*h*) Gen. iv. 14.

(*i*) Blackstone adds, (vol. iv. p. 8.) "though in fact never exercised by

"any." Vide sup. vol. II. p. 509, n. (*s*), as to the case of Don Pataleon Sa, the brother and secretary of the Portuguese ambassador.

(*k*) As to this distinction, vide sup. vol. I. pp. 36, 39; vol. II. p. 507.

[nalties for such transgressions: and this by the consent of individuals; who, in forming societies, did either tacitly or expressly invest the sovereign power with a right of making laws, and of enforcing obedience to them when made, by exercising upon their non-observance severities adequate to the evil.

The lawfulness, therefore, of punishing such criminals is founded upon this principle,—that the law by which they suffer was made by their own consent. It is a part of the original contract into which they entered when first they engaged in society; it was calculated for, and has long contributed to, their own security (*l*).

This right, therefore, being thus conferred by universal consent, gives to the State exactly the same power, and no more, over all its members, as each individual member had naturally over himself or others; which has occasioned some to doubt, how far a human legislature ought to inflict capital punishments for *positive* offences against the municipal law only, and not against the law of nature; since no individual has naturally a power of inflicting death upon himself or others, for actions in themselves indifferent. With regard to offences *mala in se*, capital punishments are in some instances inflicted by the immediate *command* of God himself to all mankind; as, in the case of murder, by the precept delivered to Noah, (their common ancestor and representative,) “Whoso sheddeth man’s blood by man shall his blood be shed(*m*).” In other instances, they] have been [inflicted after the *example* of the Creator, in his positive code of laws for the regulation of the Jewish republic,—as in the case of the crime against nature.] And they have also been [sometimes inflicted without such express warrant or example, at the will and discretion of the human legislature,] and even for offences which are *mala prohibita* only, as for forgery, or for offences of a lighter kind. But as regards mere *mala prohibita*, and indeed all cases

(*l*) Vide sup. vol. i. p. 30.

(*m*) Gen. ix. 6.

whatever, where there is no scriptural authority for the infliction, capital punishment, (supposing it to be lawful at all,) is a sanction never to be resorted to by the legislature, without the utmost circumspection (n). It may be safely laid down in reference to this subject, that [it is the enormity or dangerous tendency of the crime, that alone can warrant any earthly legislature in putting him to death that commits it. It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For though the end of punishment is to deter men from offending, it never can follow from thence that it is lawful to deter them at any rate, and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws.] It is manifest that [where the evil to be prevented, is not adequate to the violence of the preventive, a ruler that thinks seriously, can never justify such a law to the dictates of conscience and humanity. To shed the blood of our fellow creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority. For life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of Him who gave it; either expressly revealed, or collected from the laws of nature or society, by clear and indisputable demonstration.

2. As to the *end*, or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination

(n) Blackstone seems neither to deny, nor to admit, the right of the legislature to inflict death in the case of mere *mala prohibita*; but he justly remarks (vol. iv. p. 11), that if there is no right to inflict it, "the guilt of blood must lie at the door of

"the legislature, who misinterpret,
 "the extent of their warrant; and
 "not at the door of the subject, who
 "is bound to receive the interpreta-
 "tions that are given by the sove-
 "reign power."

[of the Supreme Being ; but as a precaution against future offences of the same kind. This is effected three ways, either by the amendment of the offender himself, for which purpose all corporal punishment, fines, and temporary exile or imprisonment, are inflicted : or by deterring others, by the dread of his example, from offending in the same way, “ *ut pœna* (as Tully expresses it) *ad paucos, metus ad omnes perveniat*” (o); which gives rise to all ignominious punishments, and to such executions of justice as are open and public : or lastly, by depriving the party injuring of the power to do future mischief ; which is effected by either putting him to death, or condemning him to perpetual confinement, slavery, or exile. The same one end of preventing future crimes, is endeavoured to be answered by each of these three modes of punishment. The public gains equal security, whether the offender himself be amended by wholesome correction, or whether he be disabled from doing any future harm ; and if the penalty fails of both these effects, (as it may do,) still the terror of his example remains as a warning to other citizens. The method, however, of inflicting punishment, ought always to be proportioned to the particular purpose it was meant to serve, and by no means to exceed it ; therefore the pains of death and of perpetual exile, slavery, or imprisonment, ought never to be inflicted but where the offender appears incorrigible ; which may be collected either from a repetition of minuter offences, or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment ; and in such case it would be cruelty to the public to defer the punishment of such a criminal, till he had an opportunity of repeating perhaps one of the worst of villanies.

3. As to the *measure* of human punishments. From what has been observed in the former articles, we may

(o) Pro Cluentio, 46.

[collect that the quantity of punishment can never be absolutely determined by any invariable rule; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear best calculated to answer the end of precaution against future offences.

Hence it will be evident that what some have so highly extolled for its equity, the *lex talionis*, (or law of retaliation,) can never be, in all cases, an adequate or permanent rule of punishment. In some cases, indeed, it seems to be dictated by natural reason; as in the case of conspiracies to do an injury, or false accusations of the innocent (*p*). To which we may add the law of the Jews and Egyptians mentioned by Josephus and Diodorus Siculus, —that whoever, without sufficient cause, was found with any mortal poison in his possession, should himself be obliged to take it. But in general the difference of persons, place, time, provocation, or other circumstances, may enhance or mitigate the offence; and in such cases retaliation can never be a proper measure of justice. If a nobleman strikes a peasant, all mankind will see that, if a court of justice awards a return of the blow, it is more than a just compensation. On the other hand, retaliation may sometimes be too easy a sentence; as if a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his; and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered, by decreeing, (in imitation of Solon's laws,) that he who struck out the eye of a one-eyed man, should lose both his own in return (*q*). Besides, there are very many crimes that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like; and we may add that those instances wherein retali-

(*p*) Pott. Ant. b. 1, c. 26.

(*q*) Ibid.

[ation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbour, and no more ; but this correspondence between the crime and punishment, is a consequence from some other principle.] Death is punished with death, as the appropriate manner of visiting an offence of the highest enormity, but not as an equivalent ; [for that would be expiation, and not punishment. Nor is death always an equivalent for death ; the execution of a needy decrepit assassin, is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours and his fortune. But the reason on which this sentence is grounded seems to be, that this is the highest penalty that man can inflict ; and tends most to the security of mankind, by removing one murderer from the earth, and setting a dreadful example to deter others : so that even this grand instance, proceeds upon other principles than those of retaliation.]

We may remark that [it was once attempted to introduce into England the law of retaliation, as a punishment for such only as preferred malicious accusations against others ; it being enacted by stat. 37 Edw. III. c. 18, that such as preferred any suggestions to the king's great council, should put in sureties of taliation ; that is, to incur the same pain that the other should have had, in case the suggestions were found untrue. But, after one year's experience, this punishment of taliation was rejected ; and imprisonment adopted in its stead (*r*).

But, though from what has been said, it appears that there cannot be any regular or determinate method, of rating the quantity of punishment for crimes by any one uniform rule ; but they must be referred to the will and discretion of the legislative power ; yet there are some general principles, drawn from the nature and circum-

[stances of the crime, that may be of some assistance in allotting to it an adequate punishment.

As, first, with regard to the object of it: for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury; and of course, under this aggravation, the punishment should be more severe. Therefore treason, in conspiring the death of the sovereign, is by the English law punished with greater rigour than even actually killing any private subject(s); and yet, generally, a design to transgress, is not so flagrant an enormity as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking; so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it. And it is an encouragement to repentance and remorse, even to the last stage of any crime, that it is never too late to retract; and that if a man stops even here, it is better for him than if he proceeds:] for which reason an attempt to commit a felony, is in general less penal than the actual felony. [But in the case of a treasonable conspiracy, the object whereof is the king (or queen's) majesty, the bare intention,] where there is anything in the conduct of the parties to prove that it was entertained by them, will, if manifested by any kind of overt act, [deserve the highest degree of severity; not because the intention is equivalent to the act itself, but because the greatest rigour is no more than adequate to a treasonable purpose of the heart, and there is no greater left to inflict upon the actual execution itself.

Again: the violence of passion or temptation may sometimes alleviate a crime; as theft in case of hunger, is far more worthy of compassion than when committed through

(s) In Blackstone's time the punishment for treason involved some extreme severities. It is, even at

the present day, more severe than in the case of murder. (Vide post, c. VI.)

[avarice, or to supply one in luxurious excesses. To kill a man upon sudden and violent resentment, is less penal than upon cool deliberate malice. The age, education, and character, of the offender; the repetition, (or otherwise,) of the offence; the time, the place, the company wherein it was committed—all these, and a thousand other incidents, may aggravate or extenuate the crime (*t*).

Further: as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures, those should be most severely punished which are the most destructive of the public safety and happiness (*u*). And among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing; which cannot be so easily guarded against as others; and which, therefore, the offender has the strongest inducement to commit, according to what Cicero observes (*x*), "*ea sunt animadvertenda peccata maxime, quæ difficillime præcaventur.*"]

Hence it is, that to steal a handkerchief or other trifle privately from the person of another, has always been dealt with more severely than a more open theft, though of much greater value,—as of a load of corn, standing in a field (*y*). [And in the Island of Man this rule was formerly carried so far, that to take away an ox or an ass was there no felony, but a trespass; because of the difficulty, in the little territory, to conceal them or carry them off; but to steal a pig or a fowl, (which is easily done,) was a capital crime, and the offender punishable with death (*z*).

(*t*) Thus Demosthenes (in his oration against Midias) finely works up the aggravation of the insults he had received:—"I was abused," says he, "by my enemy in cold blood, out of malice, not by heat of wine, in the morning, publicly, before strangers, as well as citizens; and that in the temple, whither the duty of my office called me."

(*u*) Beccar. c. 6.

(*x*) Pro Sexto Roscio, 40.

(*y*) In the case of simple larceny the extreme of the punishment by penal servitude, is three years. In larceny *from the person*, the limit is extended to fourteen years. (24 & 25 Vict. c. 96, ss. 4, 40.) In previous statutes, a similar distinction was observed.

(*z*) 4 Inst. 285.

[Lastly, as a conclusion to the whole, we may observe, that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually prevented by the *certainty* than by the *severity* of punishment (*a*). For the excessive severity of laws—says Montesquieu (*b*)—hinders their execution: when the punishment surpasses all measure, the public will frequently, out of humanity, prefer impunity to it. Thus, also, the stat. 1 Mary, st. 1, c. 1, recites in its preamble, “that the state “of every king consists more assuredly in the love of the “subject towards their prince, than in the dread of laws “made with rigorous pains; and that laws made for the “preservation of the commonwealth, without great penalties, are more often obeyed and kept than laws made “with extreme punishments.” Happy had it been for the realm, if the subsequent practice of that deluded princess, in matters of religion, had been correspondent to these sentiments of herself and parliament, in matters of state and government. We may further observe, that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished;—under the emperors severe punishments were revived—and then the empire fell.

It is, moreover, absurd and impolitic, to apply the same punishments to crimes of different malignity. A multitude of sanguinary laws, (besides the doubt that may be entertained concerning the right of making them,) do likewise

(*a*) Beccar. c. 7.

(*b*) Sp. L. b. 6, c. 13.

[prove a manifest defect in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is,* it must be owned, much *easier* to extirpate than to amend mankind; yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which, through ignorance or indolence, he will not attempt to cure. It has been, therefore, ingeniously proposed, that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least (c); but if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offences of an inferior rank. Where men see no distinction in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt (d).]

(c) Beccar. c. 6.

(d) Blackstone concludes these remarks with some just invectives on that frequency of capital punishment, which disgraced the English law at the time he wrote. He says (vol. iv. p. 18), “It is a melancholy truth that among the variety of actions which men are daily liable to commit, no less than 160 have been declared by act of parliament to be felonies without benefit of clergy, or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence; and judges, through compassion, will respite one half of the convicts,

“and recommend them to the royal mercy. Among so many chances of escape, the needy and hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt to relieve his wants or supply his vices; and if unexpectedly the hand of justice overtake him, he deems himself peculiarly unfortunate in falling at last a sacrifice to those laws, which long impunity has taught him to contemn.”

This exposure of the impolicy as well as inhumanity of our system in regard to punishment, might well have led to its earlier amendment. That reform, which is mainly due to the exertions of Sir Samuel Romilly towards the close of the reign of George the third, may now be said to be complete; but it owes its consummation, to the reign of our present gracious sovereign. . .

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

[HAVING in the preceding chapter considered in general the nature of crimes and punishments, we are next led in the order of our distribution to inquire what persons are or are not *capable* of committing crimes ; or, which is the same thing, who are exempted from the censures of the law, upon the commission of those acts which in other persons would be severely punished. In the process of which inquiry, we must have recourse to particular and special exceptions ; for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

All the several pleas and excuses which protect the committer of a forbidden act, from the punishment which is otherwise annexed thereto, may be reduced to this single consideration,—the want or defect in *will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt : the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. For though, *in foro conscientiæ*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it,] yet in general, and except in the rare case in which the party confesses such a design, no temporal tribunal has any means of discovering its existence, where

it has not been carried out into an external action. It is besides impossible, in any case, to ascertain that conscience might not possibly have recovered its power in time to prevent the actual perpetration of the offence; for which reasons, [in all temporal jurisdictions, an *overt* act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

Now there are three cases in which the will does not join with the act. I. Where there is a defect of understanding. For where there is no discernment there is no choice; and where there is no choice there can be no act of the will, which is nothing else than a determination of one's choice to do or to abstain from a particular action; he therefore that has no understanding can have no will to guide his conduct. II. Where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done; which is the case of all offences, committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees to it. III. Where the action is constrained by some outward force and violence. Here the will counteracts the deed; and is so far from concurring with, that it loathes and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads; as infancy, idiotcy, lunacy and intoxication, which fall under the first class; misfortune and ignorance, which may be referred to the second; and compulsion or necessity, which may properly rank in the third.]

I. Under the first division we will first consider the case of *infancy* or non-age; which is a defect of the understanding. [Infants under the age of discretion, ought not to be punished by any criminal prosecution whatever (*a*). What the age of discretion is, in various nations, is matter of some variety. The civil law has distinguished the age of minors,—or those under twenty-five years old,—into three stages: *infantia*, from the birth till seven years of age; *pueritia*, from seven to fourteen; and *pubertas*, from fourteen upwards. The period of *pueritia*, (or childhood,) was again subdivided into two equal parts; from seven to ten and a half, was *ætas infantie proxima*: from ten and a half to fourteen, was *ætas pubertati proxima*. During the first stage of infancy, and the next half stage of childhood, *infantie proxima*, minors were not punishable for any crime. During the other half stage of childhood, (approaching to puberty,) from ten and a half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief; but with many mitigations, and not with the utmost rigour of the law. During the last stage, (of the age of puberty, and afterwards,) minors were liable to be punished, as well capitally as otherwise (*b*).

The law of England does, in some cases, privilege an infant under the age of twenty-one, as to common misdemeanors: so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge or a highway, or other similar offences (*c*); for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery or the like (which infants, when full grown, are at least as liable as others to commit),] or

(*a*) Hawk. P. C. b. 1, c. 1, s. 2.
 Infancy, in reference to *civil* cases,
 has been treated of, *sup.* vol. II. p.
 314, et seq.

(*b*) Ff. 29, 5, 14, 50, 17, 111, 47,
 2, 23.

(*c*) 1 Hale, P. C. 20, 21, 22.

any perjury or cheating (*d*),—for these [an infant above the age of fourteen is equally liable to suffer, as a person of the full age of twenty-one.

With regard to more heinous crimes the law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion. By the antient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open (*e*). And from thence until fourteen, it was *ætas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion; but, under twelve, it was held that he could not be guilty in will, neither after fourteen could be supposed innocent, of any capital crime which he in fact committed. But by the law, as it now stands, and has stood at least since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old, may have as much cunning as another at fourteen; and in these cases our maxim is that "*malitia supplet ætatem*." Under seven years of age, indeed, an infant cannot be guilty of felony (*f*); for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony (*g*). Also, above seven and under fourteen, though an infant shall be *primâ facie* adjudged to be *doli incapax* (*h*), yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death.] Thus besides more antient examples [there was an instance where a boy of eight years old was tried] in the seventeenth century [at Abingdon for firing two barns; and it appearing that he had

(*d*) Bac. Ab. Infancy, H.

27.

(*e*) Wilk. Leg. Ang.-Sax. LL.
Athelstan.

(*g*) Dalt. Just. c. 147.

(*f*) Mir. c. 4, s. 16; 1 Hal. P. C.

(*h*) Vide R. v. Owen, 4 C. & P.

236.

[malice, cunning, and revenge, he was found guilty, condemned, and hanged accordingly (m). Thus also, in still later times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment(n). But, in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction.] After an infant has attained fourteen, he is presumably *doli capax*, and has no privilege by reason of his non-age, except in cases of omission and the like, as already noticed(o)—and at twenty-one, when infancy ceases, no privilege whatever in respect of age is recognized by law.

Another case in which the defect of understanding excuses from guilt, is that of [an *idiot* or a *lunatic*; for the rule of law as to the latter, (which may be easily adapted also to the former,) is that “*furiosus furore solum puni-
tur* (p).” In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no, not even for treason itself(q). Also] by the common law, [if a man in his sound memory commits a capital offence, and, before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it, with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found

(m) Emlyn on 1 Hal. P. C. 25.

(n) Foster, 72.

(o) Vide sup. p. 96.

(p) As to the state of the law
relative to idiots and lunatics in

general, vide sup. vol. i. p. 480;
vol. ii. pp. 62, 529; vol. iii. pp. 226
et seq.

(q) 3 Inst. 6.

[guilty, he loses his senses before judgment, judgment shall not be pronounced ; and if, after judgment, he becomes of nonsane memory, execution shall be stayed ; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution(*r*).] And special provisions, of the same tendency, are now made by statute ; for by 39 & 40 Geo. III. c. 94 (*s*), it is enacted, that if a person, charged with any offence, be brought up to be discharged for want of prosecution, and appear to be insane, the court may order a jury to be impanelled to try the sanity ; and if they find him insane, may order him to be kept in custody till the pleasure of the Crown be known ;—that if a person, indicted for any offence, appear insane, the court may (on his arraignment) order a jury to be impanelled to try the sanity ; and if they find him insane, may order the finding to be recorded, and the insane person to be kept in like manner ;—and that if, upon the trial for treason, murder or felony, insanity at the time of committing the offence is given in evidence, and the jury acquit, they must be required to find specially whether insane at the time of the commission of the offence, and whether he was acquitted on that account ; and if they find in the affirmative, the court may order him to be kept in like manner till the Crown's pleasure be known(*t*).

[In the bloody reign, indeed, of Henry the eighth, a statute was made, which enacted that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory(*u*). But this savage and inhuman law was repealed by the statute

(*r*) 1 Hale, P. C. 34.

(*s*) This Act applies to misdemeanor as well as felony. (R. v. Goode, 7 Ad. & El. 586 ; R. v. Little, Russ. & R. C. C. R. 430.) See also 14 & 15 Vict. c. 81, as to the removal to England and confine-

ment there, of persons tried in India, and acquitted on the ground of insanity.

(*t*) There is now an asylum especially appropriated to *criminal lunatics*, see 23 & 24 Vict. c. 75.

(*u*) 33 Hen. 8, c. 20.

[1 & 2 Ph. & M. c. 10. For, as is observed by Sir Edw. Coke (x), "the execution of an offender is, for example, *ut pœna ad paucos, metus ad omnes perveniat*:" but so it is not when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be of no example to others.]

On the other hand, however, it is not every kind or degree of insanity, that will exempt a man from responsibility for his acts; and it may be laid down in general, that a partial unsoundness of mind will be no excuse. "It is very difficult, indeed," as Lord Hale observes, "to define the invisible line that divides perfect and partial insanity; but it must be duly weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes" (y). The line of distinction referred to by Hale, has never yet been fully traced. The judges, on a late occasion, however, gave it as their opinion (z), that if a man who takes another's life appears to

(x) 3 Inst. 6.

(y) Some of the principal cases of partial insanity, upon charges of murder or malicious shooting or wounding, are Arnold's case, 16 St. Tr. by Howell, 764; Lord Ferrers' case, 19 *ibid.* 947; Hadfield's case, Collinson on Lun. 480; Parker's case, *ibid.* 477; Bowler's case, *ibid.* 673; Bellingham's case, *ib.* Addend. 636; Offord's case, 5 C. & P. 168; Oxford's case, 9 C. & P. 533; R. v. Higginson, 1 C. & K. 129; and Macnaughten's case, 10 Cl. & Fin. 200.

(z) This opinion was given in answer to certain questions propounded to the judges by the House of Lords, in reference to the discussion in that house occasioned by Macnaughten's case, in the year 1843. (See 10 Cl. &

Fin. above cited.) On the same occasion the judges said, that the question that has been generally left to the jury in cases of this description is, whether the accused at the time of doing the act *knew the difference between right and wrong*; but that the more correct question is, whether he *had a sufficient degree of reason to know that he was doing an act that was wrong*. Unless the law, however, is to be considered as conclusively settled by this authority, it would seem to be a still more correct question *whether he committed the act under the influence of any insane delusion, disguising from him its murderous character*; for, if he *did*, then, (whether the delusion was upon matter of opinion or matter of fact,) it is difficult to assent to the doctrine

have known at the time that he was acting contrary to law, his being under an insane delusion that he was thereby redressing some supposed grievance or producing some public benefit, will not exempt him from the guilt of murder; neither will he be exempted by being under an insane delusion as to *facts*; provided the supposed facts, if real, would not have justified the act; but that, on the other hand, he will be exempted by such delusion as last mentioned, where the facts, if real, would have justified the act.

Again: [as to artificial, voluntarily contracted madness, by *drunkenness* or intoxication, which, depriving men of their reason, puts them in a temporary phrenzy,—our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour (*a*). “A “drunkard,” says Sir Edward Coke, “who is *voluntarius dæmon*, hath no privilege thereby: but what hurt or ill “soever he doth, his drunkenness doth aggravate it: *nam “omne crimen ebrietas, et incendit, et detegit*” (*b*). It hath been observed that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence which may be necessary to make the blood move in Norway, would make an Italian mad. “A “German, therefore, says the President Montesquieu, “drinks through custom, founded upon constitutional

that a consciousness only that he was acting *wrong*, or *contrary to law*, would warrant convicting him for murder. At all events, it seems scarcely consistent with humanity, under such circumstances, to carry the capital sentence into effect. In Lord Erskine's celebrated speech in defence of *Hadfield*, the case is put of a lunatic destroying a man under the belief that he is a potter's vessel, and with the design of inflicting a

malicious injury on the property of a third person, whom he believes to be the owner of the vessel; and Lord Erskine argues, that it would be impossible, in such a case, to convict for murder. (As to *Hadfield's* case, see Collinson on Lunacy, p. 480.)

(*a*) See *Beverley's* case, 4 Rep. 125; *Reniger v. Fogossa*, Plow. 19; *R. v. Carroll*, 7 C. & P. 145.

(*b*) 1 Inst. 247.

[“ necessity; a Spaniard drinks through choice, or out of “ the mere wantonness of luxury; and drunkenness,” he adds, “ ought to be more severely punished, where it “ makes men mischievous and mad, as in Spain and Italy, “ than where it only renders them stupid and heavy, as “ in Germany and more northern countries”(c). And accordingly, in the warm climate of Greece, a law of Pit-tacus enacted, “ that he who committed a crime, when “ drunk, should receive a double punishment: one for the “ crime itself, and the other for the ebriety which prompted “ him to commit it”(d). The Roman law, indeed, made great allowances for this vice: “*per vinum delapsis capitalis pœna remittitur*”(e). But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another.

II. Another deficiency of will is, where a man commits an unlawful act by *misfortune* or *chance*, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed: which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter: at present only observing, that if any accidental mischief happens to follow from the performance of any *lawful* act] with due caution (f), [the party stands excused from all guilt.] But if a man, by doing anything *unlawful*, (at least if it be *malum in se*, and not merely *malum prohibitum*,) or by doing anything lawful but without due caution,—produce a consequence which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse, but he is criminally guilty of whatever consequence may follow.

[*Ignorance* or *mistake* is another defect of will; when a man intending to do a lawful act, does that which is

(c) Sp. L. b. 14, c. 10.

(d) Puff. L. b. 8, c. 3.

(e) Ff. 49, 16, 6.

(f) 1 East, P. C. c. 5, s. 36.

[unlawful. For here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake in fact, and not an error in point of law. As if a man, intending to kill a thief or house-breaker in his own house, by mistake kills one of his family, this is no criminal action (*g*): but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so, this is wilful murder. For a mistake in point of law which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. “*Ignorantia juris, quod quisque tenetur scire, neminem excusat*” (*h*), is as well the maxim of our own law (*i*) as it was of the Roman (*k*).]

III. A third kind of defect of will is, that arising from *compulsion* and inevitable *necessity*. [These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and, which it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will which God hath given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

Of this nature, in the first place, is the obligation of *civil subjection*; whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act

(*g*) Cro. Car. 538; 1 Hale, P. C. 42.

(*h*) See R. v. Bailey, R. & R. C. C. 1.

(*i*) Plowd. 343; 1 Hale, P. C. 42. Thus, it has been held, that it is no defence for a foreigner charged with

a crime committed in England, to allege that he did not know he was doing wrong,—the act with the commission of which he is charged, not being criminal in his own country. (R. v. Esop, 7 C. & P. 456.)

(*k*) Ff. 22, 6, 9.

[contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientie*, or whether the inferior in this case is not bound to obey the Divine rather than the human law, it is not our business to decide; though the question, perhaps, among the casuists, will hardly bear a doubt. But however that may be, obedience to the laws in being, is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff who burnt Latimer and Ridley in the bigoted days of Queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of its merciless sister, persecution.

As to persons in private relations, the principal case where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband. For, though neither a son, nor a servant, are excused for the commission of any crime, (whether capital or otherwise,) by the command or coercion of the parent or master (*l*), in some cases the command or authority of her husband, either express or implied, will privilege the wife from punishment, even for capital offences. And, therefore, if a woman commit theft, burglary or other civil offences against the laws of society, by the coercion of her husband; or even in his company, which the law construes a coercion; she is not guilty of any crime, being considered (as we have found occasion to explain elsewhere in this work) as acting by compulsion and not of her own will (*m*): which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of King Ina, the West Saxon (*n*). And it appears that among the northern nations on the Continent, this privilege extended to any

(*l*) Hawk. P. C. b. 1, c. 1, s. 14;
1 Hale, P. C. 44, 516.

sup. vol. 11. p. 284, and, particularly,
the authorities there cited, n. (*z*).

(*m*) As to this doctrine, see also

(*n*) Cap. 57; Wilk. 29.

[woman transgressing in concert with a man, and to any slave that committed a joint offence with a freeman: the male or freeman only was punished, the female or slave dismissed: “*proculdubio quod alterum libertas, alterum necessitas impelleret*”(o). But, (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters,) even with regard to wives the rule (we may remember) admits of an exception in the case of murder, manslaughter, and the like, these offences being of a deeper dye(p). In treason also, (the highest crime which a member of society can, as such, be guilty of,) no plea of coverture shall excuse the wife—no presumption of her husband’s coercion, shall extenuate her guilt(q). And this, as well because of the odiousness and dangerous consequence of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right — that obedience from a wife, which he himself, as a subject, has forgotten to pay. In misdemeanors, also, we may here remark another exception to the general rule, viz., that a wife may be indicted *with* her husband for keeping a brothel. For this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex(r). And in all cases where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence as much as any *feme sole*.]

Another species of compulsion or necessity is what our law calls *duress per minas*(s); that is, threats and menaces,

(o) Stiern. de Jure Sueon. 1. 2, c. 4.

(p) 1 Hale, P. C. 45, 47, 48, 516; Hawk. P. C. b. 1, c. 1, s. 11; Keyl. 31. Whether the wife is exempt in cases of *robbery*, has been doubted.

(R. v. Cruse, 8 C. & P. 552.) As to wounding with intent to disfigure, see Reg. v. Smith, 27 L. J. (M. C.) 204.

(q) 1 Hale, P. C. 47.

(r) Hawk. P. C. b. 1, c. 1, s. 12.

(s) Vide sup. vol. 1. pp. 144, 145.

which induce a fear of present death or other grievous bodily harm, and [which take away the guilt of many crimes and misdemeanors—at least before the human tribunal (*t*).] And, [therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace (*u*).] Duress *per minas* is not however an excuse in every case, for though a man be desperately assaulted and threatened with death, and cannot otherwise escape than by consenting to kill an innocent person then present,—this will not acquit him of murder if he commits the act; for he ought rather to die himself than kill an innocent (*x*). [But in such a case, he is permitted to kill the assailant; for there the law of nature and self-defence, its primary canon, have made him his own protector.] It is to be observed too, that the compulsion which takes away guilt, must be the fear of no less ~~than~~ present death or grievous bodily harm (*y*); for the mere apprehension of having houses burnt or goods spoiled, is not sufficient (*z*). It must also be a just and well-grounded fear—“*qui cadere posset in virum constantem, non timidum et meticulosum*,” as Bracton expresses it (*a*) in the words of the civil law (*b*).

[There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which, without such obligation, would be criminal. This is, when a man has his choice of two evils set before him, and being under a necessity of choosing one, he chooses the least pernicious of the two.⁴ Here the will

(*t*) Fost. 14, 216; see R. v. Tyler, 8 C. & P. 616.

(*u*) R. v. Tyler, ubi sup.; 1 Hale, P. C. 51.

(*x*) 1 Hale, P. C. 51.

(*y*) Bract. l. 3, tr. 1, c. 4; Co.

Litt. 162 a, 253 b; 2 Inst. 483; Fost. ubi sup.; R. v. Southerton, 6

East, 149.

(*z*) Bract. ubi sup.

(*a*) Ibid.

(*b*) Ff. 4, 2, 5, 6.

[cannot be said freely to exert itself, being rather passive than active; or if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity where a man, by the commandment of the law, is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority. It is here justifiable and even necessary to beat, or wound, or perhaps to kill, the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public; and therefore excuse the felony which the killing would otherwise amount to (c).

There is yet another case of necessity, which has occasioned great speculation among the writers upon general law; viz. whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities? And this both Grotius (d) and Puffendorf (e), together with many other of the foreign jurists, hold in the affirmative; maintaining, by many ingenious, humane, and plausible reasons, that in such cases the community of goods, by a kind of tacit concession of society, is revived. And some even of our own lawyers have held the same (f), though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians; at least it is now antiquated, the law of England admitting no such excuse at present (g). And this its doctrine is agreeable, not only to the sentiments of many of the wisest of the antients, particularly Cicero (h), who holds that “*sum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum*,” but also to the Jewish law, as certified by King Solomon himself (i)—“If a thief steal to satisfy his

(c) 1 Hale, P. C. 51.

(d) De Jure B. et P. l. 2, c. 2.

(e) L. of Nat. and N. l. 2, c. 6.

(f) Britt. c. 10; Murr. c. 4, s. 16.

(g) 1 Hale, P. C. 54.

(h) De Off. l. 3, c. 5.

(i) Prov. vi. 30.

[“soul when he is hungry, he shall restore sevenfold, and “shall give all the substance of his house:” which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason: for men’s properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no one can possibly be an adequate judge, but the party himself who pleads them. In this country especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by Baron Puffendorf, and whereon he builds his principal arguments; which, however they may hold] elsewhere, [yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution. Therefore our laws ought by no means to be taxed with being unmerciful, for denying this privilege to the necessitous; especially when we consider that the sovereign, on the representation of the ministers of justice, hath a power to soften the law, and to extend mercy in cases of peculiar hardship: an advantage which is wanted in many states, particularly those which are democratical; and these have in its stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate its rigour. But the founders of our constitution thought it better to vest in the Crown the power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

To these several cases in which the incapacity of committing crimes arises from a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the person: which extend as well to the will as to the other

[qualities of the mind. It is the case of the *sovereign*, who by virtue of the royal prerogative is not under the coercive power of the law: which will not suppose him capable of committing a folly, much less a crime(*k*). We are, therefore, out of reverence and decency, to forbear any idle inquiries of what would be the consequence if the sovereign were to act thus and thus: since the law deems so highly of his wisdom and virtue as not even to presume it possible for him to do any thing inconsistent with his station and dignity; and, therefore, has made no provision to remedy such a grievance. But of this sufficient was said in a former volume, to which we must refer the reader(*l*).]

(*k*) 1 Hale, P. C. 44.

(*l*) Vide sup. vol. II. p. 498 et seq.

CHAPTER III.

OF PRINCIPALS AND ACCESSORIES.

[It having been shown in the preceding chapter what persons are, or are not, upon account of their situation and circumstances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among persons that are capable of offending; viz. as *principal* and *accessory*.

I. A man may be *principal* in an offence, in two degrees. A principal in the first degree, is he that is the actor or absolute perpetrator of the crime: and, in the second degree, he who is present, aiding and abetting the fact to be done (*a*). Which *presence* need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance (*b*). And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or persuading another to drink it who is ignorant of its poisonous quality (*c*), or giving it to him for

(*a*) 1 Hale, P. C. 615. See *R. v. Howell*, 9 Car. & P. 437. In the case of *rape*, if the prisoner was present aiding and abetting, he may in the indictment be charged as principal either in the first or the second degree. (*R. v. Crisham*, 1

Car. & M. 187.) A principal in the second degree, in larceny, cannot be convicted as a *receiver*. (*Queen v. Perkins*, 21 L. J. (M. C.) 152.)

(*b*) Foster, 350.

(*c*) Kel. 52; Foster, 349.

[that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed(*d*); and the same reasoning will hold, with regard to other murders committed in the absence of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast, with an intent to do mischief; or exciting a madman to commit murder, so that death thereupon ensues: in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily pre-supposing a principal; and the poison, the pitfall, the beast, or the madman, cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty, either as principal or accessory, and cannot be so as accessory, it follows that he must be so as principal; and, if principal, then in the first degree: for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist(*e*).] It is to be observed, however, that though the law makes the distinction between principals in the first and in the second degree, yet in general the punishment inflicted upon either class of offenders is the same(*f*). But where a statute imposes the punishment of death on the persons committing a specified offence, and not on the offence itself in terms,—it has been held that such capital punishment will apply to principals in the first degree only, and not to those in the second(*g*).

II. [An *accessory* is he who is not the chief actor in the

(*d*) 3 Inst. 138; 1 Hale, P. C. 616; Hawk. P. C. b. 2, c. 29, s. 11.

(*e*) 1 Hale, P. C. 617; Hawk. P. C. b. 2, c. 29, s. 11.

(*f*) See, in particular, the follow-

ing enactments, 24 & 25 Vict. c. 96, s. 98; c. 97, s. 56; c. 98, s. 49; c. 99, s. 35; c. 100, s. 67; in reference to the felonies punishable under those Acts respectively.

(*g*) Foster, 356, 357.

[offence, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact committed. In considering the nature of which degree of guilt, we will first examine what offences admit of accessories, and what not; secondly, who may be an accessory *before* the fact; thirdly, who may be an accessory *after* it; and, lastly, how accessories, considered merely as such, and distinct from principals, are to be treated.

1. And first, as to what offences admit of accessories, and what not. In treason there are no accessories, but all are principals: the same acts that make a man accessory in felony, making him a principal in treason, upon account of the heinousness of the crime (*k*). Besides, it is to be considered, that the bare intent to commit treason is many times actual treason: as imagining the death of the sovereign, or conspiring to take away his crown. And, as no one can advise or abet such a crime without an intention to have it done, there can be no accessories before the fact; since the very advice and abetment amount to principal treason.] In murder or other felonies, [there may be accessories; except only in those offences which by judgment of law are sudden and unpremeditated, as manslaughter and the like; which therefore cannot have any accessories *before* the fact (*l*). So, too, in all crimes under the degree of felony, there are no accessories either *before* or *after* the fact; but all persons concerned therein, if guilty at all, are principals (*m*); the same rule holding with regard to the highest and lowest offences, though upon different reasons. In treason all are principals, *propter odium delicti*; in trespass all are principals, because

(*k*) 3 Inst. 138; 1 Hale, P. C. 613. As to the crime of treason, vide post, c. vi.

(*l*) 1 Hale, P. C. pp. 615, 616; Evans' case, Foster, 73. But see Reg. v. Gaylor, 1 D. & B. (C. C.) 288.

(*m*) 1 Hale, P. C. 613, 616; see Moland's case, 2 Moody's C. C. R. 276; Queen v. Greenwood, 21 L. J. (M. C.) 127. In accordance with this rule, the 24 & 25 Vict. c. 94, s. 8, declares that "whosoever shall aid, abet, counsel, or procure the

[the law, which *de minimis non curat*, does not descend to distinguish the different shades of guilt] in crimes below the degree of felony.

2. [As to the second point, who may be an accessory *before* the fact: Sir Matthew Hale defines him to be one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime(*n*). Herein absence is necessary to make him an accessory; for if such procurer, or the like, be present, he is guilty of the crime as principal(*o*). If A. then advises B. to kill another, and B. does it in the absence of A.; now B. is principal and A. is accessory to the murder. And this holds, even though the party killed be not *in rerum naturæ* at the time of the advice given. As, if A., the reputed father, advises B., the mother of a bastard child, unborn, to strangle it when born, and she does so; A. is accessory to this murder(*p*). And it is also settled, that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact(*q*). It is likewise a rule, that he who in anywise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act,] supposing at least that it was a probable consequence thereof(*r*); [but is not accessory to any act distinct from the other.] As if A. advises B. to rob C., and B. does so accordingly, and on resistance made, kills C., B. is guilty of murder as principal, and A. as accessory(*s*). [But if A. commands B. to burn C.'s house,

"commission of any misdemeanor,
"shall be liable to be indicted, tried
"and punished as a principal offender."

(*n*) 1 Hale, P. C. 615, 616.

(*o*) He is principal, if present only at the commencement of the transaction, though absent before its completion. (See *R. v. Jordan*, 7 Car. & P. 432; *R. v. Tuckwell*, 1 Car. & Mar. 215.)

(*p*) Dyer, 186.

(*q*) Foster, 125.

(*r*) This qualification of the rule will be found in *Fost.* 370. (And see 1 Hale, P. C. 617.) And it seems that in reason it must be so qualified.

(*s*) *Fost.* 370. Blackstone, vol. iv. p. 37 (after Hale), puts the case of A. commanding B. to beat C., and B. beating him so that he dies.

[and he, in so doing, commits a robbery; now A., though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and un consequential nature (*t*). But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters;—as if, upon a command to poison Titius, he is stabbed or shot, and dies;—the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of its execution is a mere collateral circumstance (*u*).

3. An accessory *after* the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts or assists the felon (*x*). Therefore, to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed (*y*),] and that it was committed by the party in question. [In the next place he must receive, relieve, comfort or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his pursuers, a house or other shelter to conceal him, or open force and violence to rescue or protect him (*z*). So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. But to relieve a felon in gaol with clothes or other necessaries, is no offence; for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law (*a*). Again, to buy or receive stolen goods, knowing them to be stolen,] does not fall within the

But this alone would perhaps not suffice to make A. accessory to the murder.

(*t*) Hawk. P. C. b. 2, c. 29, s. 22.

(*u*) Ibid. s. 20.

(*x*) 1 Hale, P. C. 618.

(*y*) Hawk. P. C. b. 2, c. 29, s. 32.

(*z*) Ibid. ss. 26, 27, 28.

(*a*) 1 Hale, P. C. 620, 621.

definition of this offence; and at common law, it was a misdemeanor only, because the offender [received the *goods* only and not the *felon*.] But this offence (as we shall see in the appropriate place) is now differently treated (*b*).

[The felony must be complete at the time of the assistance given, else it makes not the assistor an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide; for till death ensues there is no felony committed (*c*). But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child the parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband receives his wife, who have any of them committed a felony, the receivers become accessories *ex post facto* (*d*). But a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion; and therefore she is not bound, neither ought she, to discover her lord (*e*).

4. The last point of inquiry is, how accessories are to be treated, considered distinct from principals: and the general rule of the antient law,—borrowed from the Gothic constitutions (*f*),—is this, that accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable: as, by the laws of Athens, delinquents and their abettors were to receive the same punishment (*g*).] With which, as regards accessories

(*b*) As to receiving stolen goods, vide post, chap. v.

(*c*) Hawk. P. C. b. 2, c. 29, s. 35.

(*d*) 3 Inst. 108; Hawk. P. C. b. 2, c. 29, s. 34.

(*e*) 1 Hale, P. C. 47, 621; see Reg. v. Good, 1 Car. & K. 185. So

also a wife cannot be indicted for receiving goods stolen by her husband. (Reg. v. Brooks, 22 L. J. (M. C.) 121.)

(*f*) See Stiern. de Jure Goth. l. 3, c. 5.

(*g*) Pott. Antiq. b. 1, c. 26.

before the fact, the modern rule is strictly consonant; for by 24 & 25 Vict. c. 94, s. 1, all these are to be indicted, tried, convicted, and punished in all respects as if they were principal felons (*h*). [Why then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment?

For these reasons: 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the commission of an actual robbery being quite a different accusation from that of harbouring the robber. 2.] Because, though accessories before the fact are treated as principals, yet accessories after the fact are usually punished with less severity (*i*). 3. Because, formerly, no man could be tried as accessory till after the principal was convicted, or, at least, he must have been tried at the same time with him (*k*); though that rule is now wholly abolished (*l*). 4. [Because, though

(*h*) This provision is a re-enactment of 11 & 12 Vict. c. 46, s. 1 (repealed by 24 & 25 Vict. c. 95). See also 24 & 25 Vict. c. 96, s. 98; c. 97, s. 56; c. 98, s. 49; c. 99, s. 35; c. 100, s. 67, in reference to the particular felonies punishable under those Acts, respectively.

(*i*) Accessories *after* the fact to any felony, are in general punishable with imprisonment for any term not exceeding two years; with or without hard labour, and may also be required to find security to keep the peace, or in default, to suffer an additional imprisonment to the extent of one year. [See 24 & 25 Vict. c. 94, s. 4, and the enactments cited *supra*, n. (*h*).] But accessories after the fact *to murder* are by 24 & 25 Vict. c. 100, s. 67, punishable by penal servitude for life, or not less than three years, or to be imprisoned with or without hard labour

to the extent of two years. It is the opinion of Blackstone (vol. iv. p. 39), that "if a distinction were constantly to be made between the punishments of principals and accessories even *before* the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices by reason of the difference of his punishment." And he cites Beccaria, c. 37, in support of this doctrine.

(*k*) 1 Hale, P. C. 623; Foxt. 363.

(*l*) It was abolished as to accessories before the fact by 7 Geo. 4, c. 64. And, now, by 24 & 25 Vict. c. 94, (re-enacting in substance, 11 & 12 Vict. c. 46, ss. 1, 3,) it is provided, that an accessory *before* the fact to any felony, shall be in-

[a man be indicted as accessory, and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counselling a felon, is no acquittal of the felony itself.] Yet it was formerly a [matter of some doubt, whether, if a man were acquitted as principal, he could afterwards be indicted as accessory before the fact, since those offences are frequently very near allied; and therefore an acquittal of the guilt of one may be an acquittal of the other also (*m*).] .But that doubt has been since overruled (*n*); and it has always been [clearly held, that one acquitted as principal, may be indicted as accessory *after* the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons, the distinction of principal and accessory will appear to be highly necessary;] though the punishment is, in all cases, the same with regard to principals and accessories before the fact.

dicted, tried, convicted, and punished, in all respects as if he were a principal felon. It is further enacted by the same Act, that any accessory either *before* or *after* the fact may be indicted and convicted, either as such accessory together with the principal felon, or after his conviction: or may be indicted and convicted of a substantive felony, whether the principal felon shall have

been convicted or not, or shall or shall not be amenable to justice, and may thereupon be punished as an accessory before or after the fact, (if convicted as an accessory,) may respectively be punished. (24 & 25 Vict. c. 94, ss. 1, 2, 3.)

(*m*) 1 Hale, P. C. 625, . 626; Hawk. P. C. b. 2, c. 35, s. 11.

(*n*) R. v. Birchenough, 1 M.C.C.R. 477; R. v. Parry, 7 C. & P. 836.

CHAPTER IV.

OF OFFENCES AGAINST THE PERSON.

IN the present chapter we are to enter, in pursuance of the distribution before laid down, upon the detail of the several species of crimes and misdemeanors, with the punishments annexed to each by the laws of England (*a*).

And here we shall pursue in general, and so far as the nature of the criminal law permits, the same arrangement which we adopted for the illustration of the law relative to civil injuries (*b*): and shall, consequently, be led to treat—first, of offences against the *persons* of individuals; secondly, against their *property*; and thirdly, against those *public rights* which belong in common to all the different members of the commonwealth.

First, then, with respect to those crimes, which affect the persons of individuals.

Were such offences as these, and such as are committed against the property of individuals, confined to individuals only, [and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs; for which a satisfaction would be due only to the party injured: the manner of obtaining which, was the subject of our inquiries in the preceding volume. But the wrongs of which we are now to treat, are of a much more extensive consequence; in the first place, because] they are all considered as contempts of public justice, or (what is the same thing) of the Crown which is the fountain of that justice (*c*): [secondly, because they include in them almost

(*a*) Vide sup. p. 86.

(*c*) Vide sup. vol. II. p. 527.

(*b*) Vide sup. vol. III. p. 486.

[always a breach of the public peace: and, lastly, because by their example and evil tendency, they threaten and endanger the subversion of all civil society. Upon these accounts it is, that, besides the private satisfaction due and given in many cases to the individual by action for the private wrong, the Government also calls upon the offender to submit to public punishment for the public crime; and the prosecution of these offences is always at the suit and in the name of the sovereign; in whom, by the tenure of our constitution, the *jus gladii*, or executory power of the law, entirely resides. Thus, too, in the old Gothic constitution, there was a threefold punishment inflicted on all delinquents: first, for the private wrong to the party injured: secondly, for the offence against the sovereign by disobedience to the laws; and, thirdly, for the crime against the public by their evil example. Of which we may trace the groundwork in what Tacitus tells us of his Germans; that, whenever offenders were fined, “*pars mulctæ regi, vel civitati, pars ipsi, qui vindicatur, vel propinquis ejus, exsolvitur*” (c).]

[Of crimes injurious to the *persons* of private subjects the most principal and important is the offence of taking away life, which is the immediate gift of the great Creator; and of which, therefore, no man can be entitled to deprive himself or another, but in some manner either expressly commanded in, or evidently deducible from, those laws, which the Creator has given us—the Divine laws of either nature or revelation.] The first offence, therefore, to be discussed in the present chapter will be that of—

I. [*Homicide*, (or destroying the life of man,) in its several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.]

Now homicide, or the killing of any human creature, is either *free from legal guilt*,—the circumstances being such

as to render it *justifiable*, or at least *excusable*; or it is *felonious* (*d*).

1. Justifiable homicide is of divers kinds. First, such as is occasioned by the due *execution of public justice*, in putting a malefactor to death who hath forfeited his life by the laws of his country. [This is an act of necessity, and even of civil duty; and, therefore, not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable: therefore, wantonly to kill the greatest of malefactors, (such as a felon or a traitor, attainted or outlawed,) deliberately, uncompelled and extrajudicially, is murder (*e*). For, as Bracton very justly observes, “*istud homicidium, si fit ex livore, vel delectatione effundendi humanum sanguinem, licet justè occidatur iste, tamen occisor peccat mortaliter, propter intentionem corruptam*” (*f*). And, further, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder (*g*). And, upon this account, Sir Matthew Hale himself, though he accepted the place of a judge of the Common Pleas under Cromwell’s government, (since it is necessary to decide the disputes of civil property in the worst of time,) yet declined to sit on the Crown side at the assizes or to try prisoners, having very strong objections to the legality of the usurper’s commission (*h*); a distinction, perhaps, rather too refined, since the punishment of crimes is at least as necessary to society as maintaining the boundaries of property. Also such judgments, when legal, must be executed by the proper officer or his appointed deputy: for no one else is *required* by law to do it; which requisition

(*d*) Blackstone describes homicide (vol. iv. p. 177) as of three kinds: *justifiable*, *excusable*, and *felonious*; and this accords with the division of Hawkins; but there appears, under the existing law, to be no practical distinction between justifiable and

excusable homicide. (Vide post, p. 143.)

(*e*) 1 Hale, P. C. 497.

(*f*) L. 3, tr. 2, c. 4.

(*g*) Hawk. P. C. b. 1, c. 28, s. 5; 1 Hale, P. C. 497.

(*h*) Burnet *in vitam*.

[it is, that justifies the homicide. If another person doth it of his own head, it is held to be murder (*i*), even though it be the judge himself (*k*). It must, further, be executed *servato juris ordine*—it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versâ*, it is murder; for he is merely ministerial, and, therefore, only justified when he acts under the authority and compulsion of the law. But if he changes one kind of death for another, he then acts by his own authority; which extends not to the commission of homicide,] otherwise than as according to the sentence; [and, besides, such licence might occasion a very gross abuse of his power. The sovereign, indeed, may remit part of a sentence,—as, in the case of treason,] he has often remitted (more particularly in the case of a peer), all but the beheading; but this was no change, no introduction of a new punishment (*l*); and in the case of an ordinary capital felony, [where the judgment is to be *hanged*, the sovereign, it hath been said, cannot legally order even a peer to be beheaded (*m*).]

Secondly, justifiable homicide may be [committed for the *advancement of public justice*;] as in the following instances: 1. Where an officer or his assistant, in the due execution of his office, either in a criminal or civil case, arrests or attempts to arrest a party who resists, and is consequently killed in the struggle (*n*); 2. Where, in case of a riot or rebellious assembly, the officers or their assistants kill any of the mob, in the endeavour to disperse them; which is justifiable [both at common law and by the Riot Act, 1 Geo. I. c. 5 (*o*);] 3. [Where the prisoners in a gaol assault the gaoler or officer, and he in his defence kills any of them; which is justifiable, for the sake of preventing an escape (*p*);] 4. Where an officer

(*i*) 1 Hale, P. C. 501; Hawk. P.
C. b. 1, c. 28, s. 9.

(*k*) Dalt. Just. c. 150.

(*l*) It was not at least, as the sentence stood in Blackstone's time. (4 Bl. Com. p. 92.)

(*m*) 3 Inst. 52, 212.

(*n*) Foster, 270, 309; 1 Hale, P. C. 494.

(*o*) 1 Hale, P. C. 495; Hawk. P. C. b. 1, c. 65, ss. 11, 12.

(*p*) 1 Hale, P. C. 496.

or his assistant, in the due execution of his office, arrests or attempts to arrest a party for felony (*o*), or for a dangerous wound given; and the party having notice thereof flies, and is killed by such officer or assistant in the pursuit (*p*); 5. Where, upon such offence as last described, a private person in whose sight it has been committed, arrests or endeavour to arrest the offender; and kills him in resistance or flight, under the same circumstances as above mentioned with regard to an officer (*q*). But in all these cases, [there must be an apparent necessity—that is, it must be shown that] the party could not be otherwise secured, [the riot could not be suppressed, the prisoners could not be kept in hold, unless such homicide was committed: otherwise, without such absolute necessity, it is not justifiable.]

Thirdly, [such homicide as is committed for the *prevention of any forcible and atrocious crime* (*r*), is justifiable by the law of nature (*s*); and also by the law of England as it stood so early as at the time of Bracton (*t*),] and as it stands at the present day (*u*). [If any person attempts the robbery or murder of another, or attempts to break open a house *in the night time*, and shall be killed in such attempt,] either by the party assaulted, or the owner of the house, or the servant attendant upon either, or by any other person present and interposing to prevent mischief (*v*), [the slayer shall be acquitted and discharged (*x*). This reaches not

(*o*) But the officer is not protected if he kill a man *apparently* committing a misdemeanor, though the crime be really a felony. The Queen v. Dodson, 20 L. J. (M. C.) 57.

(*p*) Fost. 271.

(*q*) Fost. 271; 2 Hale, P. C. 77, 82. As to the killing by a private person who arrests on suspicion only, and is resisted, see 2 Hale, P. C. 83, 84; Fost. 318. It seems it is not justifiable.

(*r*) Fost. 275; Hawk. P. C. b. 1, c. 28, ss. 21, 24.

(*s*) Puff. L. of N. l. ii. c. 5.

(*t*) L. 3, tr. 2, c. 36.

(*u*) See Mawgridge's case, Keyl. 128, 129.

(*v*) Fost. 274.

(*x*) 1 Hale, P. C. 488; Fost. 274.

This was expressly provided by the statute 24 Hen. 8, c. 5; and though that statute was repealed by 9 Geo. 4, c. 31 (now itself repealed by 24 & 25 Vict. c. 95), its repeal has made no alteration of the law as laid down in the text,—the statute of Hen. 8, having been made in affirmation of the common law. (See Fost. 275.)

[to any crime unaccompanied with force,—as picking of pockets; or to the breaking open of any house *in the day time*, unless it carries with it an attempt of robbery,] arson, murder, or the like (*y*). [So the Jewish law, which punished no theft with death, makes homicide only justifiable in case of *nocturnal* housebreaking: “if a thief be found breaking “ up, and he be smitten that he die, no blood shall be shed “ for him; but if the sun be risen upon him, there shall “ blood be shed for him, for he should have made full “ restitution” (*z*).

At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact (*a*): and by the Roman Law of the Twelve Tables, a thief might be slain by night with impunity; or even by day, if he armed himself with any dangerous weapons (*b*): which amounts very nearly to the same as is permitted by our own constitutions. The Roman law also justifies homicide, when committed in defence of the chastity, either of one’s self or relations (*c*): and so also, according to Selden, stood the law in the Jewish republic (*d*). The English law likewise justifies a woman killing one who attempts to ravish her (*e*): and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other (*f*). And no doubt the forcibly attempting a crime of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor (*g*).]

(*y*) 1 Hale, P. C. 488; 1 East, P. C. c. 5, s. 44; Hawk. P. C. b. 1, c. 28, s. 23; Fost. 274; see also 24 Hen. 8, c. 5, cited sup. p. 134, n. (*x*).

(*z*) Exod. xxii. 2. ✱

(*a*) Potter, Antiq. b. i. c. 24. •

(*b*) Cic. pro Milone, 3; Ff. 9, 2, 4.

(*c*) “*Divus Hadrianus rescripsit eum qui stuprum sibi vel suis infe-*

rentem occidit, dimittendum.”—Ff. 48, 8, 1.

(*d*) De Legibus Hebræor. l. iv. c. 3.

(*e*) Bac. Elem. 34; Hawk. P. C. b. 1, c. 28, s. 21; Fost. 274.

(*f*) 1 Hale, P. C. 485, 486.

(*g*) Blackstone here proceeds (vol. iv. p. 181) to give his opinion of the principle upon which homicide be-

Fourthly, there is one species of justifiable homicide [where the party slain is equally innocent, as he who occasions his death. And yet this homicide is also] justifiable, [from the great universal principle of self-preservation (*h*); which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish; as, among others, in that case mentioned by Lord Bacon, where two persons being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned (*i*).]

2. [Excusable homicide is of two sorts, either *per infortunium*, by misadventure; or *se defendendo*,] upon a sudden affray.

[Homicide *per infortunium*, is where a man, doing a lawful act without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a stander by; or where a person is shooting at a mark, and undesignedly kills a man (*h*): for the act is lawful, and the effect is

comes justifiable, when for the prevention of crime. He says, "The one uniform principle that runs through our own and all other laws seems to be this, that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting." And at the same time he combats the doctrine of Locke's Essay on Government, p. 2, c. 5, "That all manner of force, without right, upon a man's person, puts him in a state of war with the aggressor; and, of consequence, being in such a state of war, he may lawfully kill him that puts him under this unnatural restraint." We may be al-

lowed, however, to question the soundness of the former as well as the latter opinion. If the former be correct, it will follow that, as rape has now ceased to be capital, the justification of homicide for the prevention of rape is also taken away; but there can be no doubt that it remains in full force.

(*h*) Blackstone says *excusable* (vol. iv. p. 186); but it seems clear that this is a case of *justifiable* and not merely excusable homicide; and it is so ranked by Hawkins, P. C. b. 1, c. 28, s. 26.

(*i*) Elem. c. 5. See also Hawk. P. C. b. 1, c. 28, s. 26.

(*k*) Hawk. P. C. b. 1, c. 29, ss. 2, 6.

[merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure, for the act of correction was lawful; but if he exceeds the bounds of moderation either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases, according to the circumstances, murder (1); for the act of immoderate correction is unlawful. Thus by an edict of the Emperor Constantine, when the rigour of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment; and if death accidentally ensued, he was guilty of no crime; but if he struck him with a club or a stone, and thereby occasioned his death; or if in any other yet grosser manner, “*immoderate suo jure utatur,—tunc reus homicidii sit*” (m).

But to proceed. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and sword playing, the succeeding amusements of their posterity; and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is manslaughter and felony. But if the sovereign command or permit such diversion, it is said to be only misadventure; for then the act is lawful (n). In like manner, as by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games authorized or permitted by the state, was not held to be guilty of homicide (o). Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of dangerous

(1) 1 Hale, P. C. 473, 474; Hawk.
P. C. b. 1, c. 29, s. 5.
(m) Cod. l. lx. t. 14.

(n) Hawk. P. C. b. 1, c. 29, s. 8.
(o) Plato de Leg. l. vii.; Ff. 9,
2, 7.

[consequence (*p*). And in general, if death ensues in consequence of a dangerous, idle, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing,—in these and similar cases the slayer is guilty of manslaughter, and not misadventure only; for these are unlawful acts (*q*).

As for homicide *se defendendo*, upon a sudden affray (*r*),—this is also excusable rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of an atrocious crime,] and where the slayer is himself free from all blame (*s*); [which is not only a matter of excuse, but of justification. But the self-defence which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him:] in which latter case the law presumes both parties to be in some degree in fault (*t*). And this is one instance, of [what the law expresses by the word *chance medley*; or, as some chose rather to write it, *chaud medley*: the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import: but the former is, in common speech, too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. VIII. c. 5, and our antient books, that it is properly applied to such killing as happens upon a sudden rencounter (*u*). This right of natural

(*p*) Hawk. P. C. b. 1, c. 29, s. 3; Ward's case, 1 East, P. C. 270.

(*q*) 1 Hale, P. C. 472; Fost. 275; Hawk. P. C. b. 1, c. 30, s. 1.

(*r*) This is called by Mr. Justice Foster, "*homicide se defendendo* upon chance medley."—Fost. 275.

(*s*) Hawk. P. C. b. 1, c. 28, s. 24.

(*t*) Ibid. The slayer is however

no longer punishable by law, though it was formerly otherwise. Vide post, p. 143.

(*u*) Blackstone (vol. iv. p. 184) defines *chance medley*, to be such killing as happens in *self-defence* in the course of a sudden brawl. But it is clear that the term equally applies, though the killing in the course

[defence does not imply a right of attacking ; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases ; when certain and immediate suffering, would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible, or at least probable, means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide in self-defence,] upon sudden affray, [from that of manslaughter in the proper legal sense of the word (*x*). But the true criterion between them seems to be this : when both parties are actually combating, at the time when the mortal stroke is given,] or if the slayer was not at that time in immediate danger of death (*y*), [the slayer is guilty of manslaughter : but if the slayer hath not begun to fight, or having begun,] declines, or [endeavours to decline, any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence (*z*). For which reason the law requires, that the person who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault,] before he gives the mortal stroke (*a*) ; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood (*b*). And though it may be cowardice, in time of

of a brawl shall be such as to amount to *manslaughter*. See stat. 24 Hen. 8, c. 5 ; Keyl. 67 ; 3 Inst. 55, 59 ; Hawk. P. C. b. 1, c. 30, s. 1 ; Fost. 275.

(*x*) 3 Inst. 55.

(*y*) Fost. 277.

(*z*) Ibid.

(*a*) Blackstone says (vol. iv. p.

185), "before he turns upon his assailant." But though a person retreating to the wall should give several wounds in the course of his retreat, yet if he gives no mortal one till he gets thither, it is homicide *se defendendo* only. 1 Hale, P. C. 479 ; Hawk. P. C. b. 1, c. 29, s. 15.

(*b*) If a man strike another upon

war between two [independent nations, to flee from an enemy, yet between two fellow-subjects the law countenances no such point of honour: because the sovereign and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves (*d*). In this the civil law also agrees with ours, or perhaps goes rather farther,—“*qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt*” (*e*). The party assaulted, must therefore flee as far as he conveniently can, either by reason of some wall, ditch or other impediment, or as far as the fierceness of the assault will permit him (*f*); for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm, and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice, as well as of the municipal law (*g*).

And, as the *manner* of the defence, so is also the *time* to be considered; for if the person assaulted, does not fall upon the aggressor till the fray is over, or when he is running away, this is revenge and not defence. Neither under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder; for if two persons, A. and B., agree to fight a duel, and A. gives the first onset, and B. retreats as far as he safely can, and then kills A.; this is murder, because of the previous malice and concerted design (*h*). But if A., upon a sudden quarrel, assaults B. first, and upon B.’s returning the assault, A. really and *bonâ fide* flies; and, being driven to the wall, turns again upon B. and kills him: this may be *se defendendo* according to some of our writers (*i*): though others (*k*) have thought this opinion too favourable, inas-

malice prepense, and then fly to the wall, and there kill him in his own defence, he is guilty of murder.
Hawk. P. C. b. 1, c. 29, s. 17.

(*d*) 1 Hale, P. C. 481.

(*e*) Ff. 9, 2, 45.

(*f*) 1 Hale, P. C. 483.

(*g*) Puff. b. 2, c. 5, s. 13.

(*h*) 1 Hale, P. C. 479.

(*i*) Ibid. 482.

(*k*) Hawk. P. C. b. 1, c. 29, s. 17.

[much as the necessity, to which he is at last reduced, originally arose from his own fault (*l*). Under this excuse of self-defence, the principal civil and natural relations are comprehended. Therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting, being construed the same as the act of the party himself (*m*).]

Excusable homicide, in both the species here described, was formerly considered as involving in it some degree of legal blame or punishment; and as distinguishable, in this respect, from that which was *justifiable*. In the case of misadventure the law presumed negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it: who therefore was not altogether faultless (*n*). [And as to the necessity which excuses a man who kills another] in a sudden fray [*se defendendo*, Lord Bacon entitles it *necessitas culpabilis* (*o*).] For it was always understood, (as before remarked,) that [the quarrel or assault arose from some unknown wrong, or some provocation in word or deed: and since in quarrels both parties may be, and usually are, in some fault—and as it scarce can be tried who was originally in the wrong—the law would not hold the survivor entirely guiltless. The law besides might have a further view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining that he who slays his neighbour, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.]

Nor was [the law of England singular in this respect. Even the slaughter of enemies required a solemn purgation among the Jews; which implies that the death of a man, however it happens, will leave some stain behind it.

(*l*) Vide sup. p. 139, n. (*b*).

(*m*) 1 Hale, P. C. 484.

(*n*) Hawk. P. C. b. 1, c. 28, s. 24.

(*o*) Elem. c. 5.

[And the Mosaical law, appointed certain cities of refuge for him who killed his neighbour unawares: “as if a man
 “goeth into the wood with his neighbour to hew wood,
 “and his hand fetches a stroke with his axe to cut down a
 “tree, and the head slippeth from the helve, and lighteth
 “upon his neighbour that he die, he shall flee unto one of
 “these cities and live” (g). But it seems he was not held wholly blameless, any more than in the English law: since the avenger of blood might slay him before he reached his asylum; or if he afterwards stirred out of it, till the death of the high priest. In the Imperial law, likewise, casual homicide was excused by the indulgence of the emperor, signed with his own sign-manual, “*adnotatione principis*,” otherwise the death of a man, however committed, was in some degree punishable (r). Among the Greeks, homicide by misfortune was expiated by voluntary banishment for a year (s). In Saxony, a fine was paid to the kindred of the slain: which also, among the Western Goths, was little inferior to that of voluntary homicide (t);] and formerly in France, no person was ever absolved in cases of this nature, [without a largess to the poor, and the charge of certain masses for the soul of the party killed (u).]

The penalty for an excusable homicide inflicted by our laws, is said by Sir Edward Coke to have been antiently no less than death (x); which, however, is with reason denied by later and more accurate writers (y). It seems rather to have consisted in a forfeiture; some say of all

(g) Numb. xxxv. and Deut. xix.

(r) Cod. 9, 16, 5.

(s) Plato de Leg. l. 9. To this expiation by banishment, the spirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty-third Iliad, that, when a child, he was obliged to flee his country for casually kill-

ing his playfellow, — “*νηπιος οὐκ ἔβηλον*.”

(t) Stiern. de Jure Goth. l. 3, c. 4.

(u) 4 Bl. Com. 188, cites De Morney on the Digest.

(x) 2 Inst. 148, 315.

(y) 1 Hale, P. C. 425; Hawk. P. C. b. 1, c. 29, s. 21; Fost. 282.

[the goods and chattels, others only of part of them; by way of fine or *weregild* (z). Which was probably disposed of, (as in France,) *in pios usus*, according to the humane superstition of the times, for the benefit of *his* soul who was suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty, especially if a total forfeiture, growing more severe than was intended, in proportion as personal property became more considerable, the delinquent had, as early as our records will reach, a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same (a).] And in later times, to prevent this expense, in cases where the death notoriously happened by misadventure or in self-defence, the judges usually directed a general verdict of acquittal (b). Afterwards, by statute 9 Geo. IV. c. 31, s. 10, it was provided, that no punishment or forfeiture, should be thenceforth incurred by any person who should kill another by misfortune or in his own defence, or in any other manner without felony; and though this provision has been recently repealed, a clause to the same effect is inserted in 24 & 25 Vict. c. 100 (c), the statute by which offences against the person are now regulated. So that all practical distinction between justifiable and excusable homicide is now wholly done away.

3. [*Felonious* homicide is an act of a very different nature from the former; being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self, or another man.

Self-murder,^u the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to

(z) Fost. 287.

(a) Fost. 283. Hawk. P. C. b. 2, c. 37, s. 2.

(b) Fost. 288; 4 Bl. Com. 188;

and see Christian's note at that place.

(c) Sect. 7.

[avoid those ills which they had not the fortitude to endure, —though the attempting it seems to be countenanced by the civil law (*e*), yet was punished, by the Athenian law, with cutting off the hand which did the desperate deed (*f*). The law of England, also, wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it. And as the suicide is guilty of a double offence: one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the sovereign, who hath an interest in the preservation of all his subjects: our law has ranked this among the highest crimes,—making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder (*g*). A *felo de se*, therefore, is he that deliberately puts an end to his own existence;] and he also is so considered, who, maliciously attempting to kill another, occasions his own death; as where a man shoots at another, and the gun bursts and kills himself (*h*). But if a man is killed at his own request by the hand of another, the former is not deemed in law a *felo de se*, though the latter is a murderer (*i*). In homicide committed on one's self, [the party must be of years of discre-

(*e*) "*Si quis impatientiâ doloris, aut tædio vitæ, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum.*"—Ff. 49, 16, 6.

(*f*) Pott. Antiq. b. 1, c. 26.

(*g*) 4 Bl. Com. p. 189; Keylw. 136. Notwithstanding this opinion of Blackstone, it was afterwards adjudged that such accessory could not be tried for murder, as his principal could not be tried. (See *R. v. Russell*, 1 Moo. C. C. R. 356; *R. v. Laddington*, 9 C. & P. 79.) But by recent statutes, and now by 24 & 25 Vict. c. 94, s. 2, an accessory

either before or after the fact—as stated sup. p. 128, n. (*l*)—is made liable to be tried and convicted whether the principal felon shall or shall not be amenable to justice. It may be observed here, that if two persons mutually agree to commit suicide *togethr.*, and accordingly take poison or the like together, and one only dies, the survivor is guilty of murder. (*R. v. Dyson*, R. & R. 523; *R. v. Alison*, 8 C. & P. 418.)

(*h*) Hawk. P. C. b. 1, c. 27, s. 4.

(*i*) Ibid. s. 6.

[tion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length to which our coroners' juries are apt to carry it, viz. that the very act of suicide is an evidence of insanity: as if every man, who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges that every melancholy or hypochondriac fit, does not deprive a man of the capacity of discerning right from wrong;] or rather, (to express it more correctly,) prevent his having a sufficient degree of reason to know that his act is wrong; which is necessary, as was held in Macnaughten's case, to form a legal excuse (*j*). [And therefore if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man (*k*).

But now the question follows, what punishment can human laws inflict, on one who has withdrawn himself from their reach? They can only act upon what he has left behind him—his reputation and fortune;] and this the

(*j*) Vide sup. p. 112, n. (z).

(*k*) 1 Hale, P. C. 412. The views of our most eminent writers upon criminal law agree, in this respect, with Blackstone. "It is not "every melancholy or hypochondriac distemper that denominates "a man *non compos*," (says Sir M. Hale, ubi sup.,) "for there are "few who commit this offence (of "suicide) but are under such infirmities; but it must be such an "alienation of mind that renders "them to be madmen or frantic, or "destitute of reason." And Hawkins, (b. 1, c. 27, s. 2,) lays down a similar doctrine; and reprobates the notion, which he says had unaccountably prevailed of late, that every one who kills himself must be *non compos*. It is to be observed, however, that there are many cases

of suicide, in which no motive for the act appears, or can be imagined, such as can be supposed to operate upon a mind free from morbid delusion. In these circumstances the practice of juries to return a verdict of insanity, without further evidence of unsoundness of mind, does not seem fairly to fall under the censure in the text. In other kinds of murder, also, this apparent want of rational motive is of frequent occurrence; and ought, it would seem, to lead to the same conclusion. But the *danger* of acquittal on this ground, without further proof of insanity, is too obvious to require remark; and should always deter a jury from a verdict of that description, unless the circumstances be very strong and peculiar.

law of England formerly did with the greatest severity. It acted [on the former, by an ignominious burial in the highway, with a stake driven through his body,] and without Christian rites of sepulture; [on the latter, by a forfeiture of all his goods and chattels to the Crown, hoping that his care for either his own reputation or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act.] But the only consequences now are, the forfeiture and the deprivation of Christian rites. For by 4 Geo. IV. c. 52, s. 1, it is provided, that it shall not be lawful for the coroner to direct the interment of a *felo de se* in any public highway; but he shall direct him to be interred,—without any stake being driven into his body,—in the churchyard or other burying ground; within twenty-four hours after the inquisition, and between nine and twelve at night: it being declared, however, that this shall not authorize the rites of Christian burial. As to the forfeiture it is observable that it has relation [to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself,—the land shall be forfeited to the Crown, and the wife shall not have the survivorship. For by the act of casting himself into the water he forfeits the term, which gives a title to the Crown prior to the wife's title by survivorship; which could not accrue till the instant of her husband's death (1). And though it must be owned that the letter of the law herein borders a little upon severity, yet it is some alleviation that the power of mitigation is left in the breast of the sovereign; who upon this, (as on all other occasions,) is reminded by the oath of his office, to execute judgment in mercy.

The other species of criminal homicide is, that of killing another man. But in this there are also degrees of guilt, which divide the offence into *manslaughter* and *murder*. The difference between which, may be partly collected from what has been incidentally mentioned in the preceding

(1) Finch, L. 216.

[articles: and principally consists in this, that manslaughter, when voluntary, arises from the sudden heat of the passions; murder, from the wickedness of the heart.

First. *Manslaughter* is, therefore, thus defined (*m*): the unlawful killing of another, without malice, either express or implied (*n*): which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. These were called, in the Gothic institutions, "*homicidia vulgaria; quæ aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiæ calore et impetu*" (*o*): and hence it] has been held [that in manslaughter there can be no accessories before the fact (*p*); because it must be done without premeditation.

As to the first or *voluntary* branch: if upon a sudden quarrel] in the way of chance medley (*q*), [two persons fight, and one of them kills the other, that is manslaughter; and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion (*r*), and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though he is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter (*s*). But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kill the other, this is deliberate revenge, and not heat

(*m*) 1 Hale, P. C. 466.

(*n*) In an indictment for manslaughter, the charge should be that "the defendant did feloniously kill and slay the deceased," and it is unnecessary to set forth the manner or means. (24 & 25 Vict. c. 100,

s. 6.)

(*o*) Stiern. de Jure Goth. l. 3, c. 4.

(*p*) Vide sup. p. 124, n. (l).

(*q*) Vide sup. p. 126.

(*r*) Hawk. P. C. b. 1, c. 31, s. 29.

(*s*) Kelyng, 135.

[of blood; and accordingly amounts to murder (*t*). So if a man takes another in the act of adultery with his wife, and kill him directly on the spot; though this was allowed by the laws of Solon (*u*), as likewise by the Roman civil law if the adulterer was found in the husband's own house (*v*),—and also among the ancient Goths (*x*),—yet in England it is not absolutely ranked in the class of justifiable homicides, as in the case of forcible rape; but it is manslaughter (*y*). It is, however, the lowest degree of it; and therefore in such a case the court directed the burning in the hand,] formerly inflicted for manslaughter and other felonies not punished with death, [to be gently inflicted; because there could not be a greater provocation (*z*). Manslaughter therefore on a sudden provocation, differs from excusable homicide *se defendendo* on a sudden affray, in this; that in the one case there is an apparent necessity for self-preservation to kill the aggressor; in the other there is no necessity at all, being only a sudden act of revenge (*a*).

The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure, in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, (unless by the king's command,) and one of them kills the other; this is manslaughter, because the original act was unlawful: but it is not murder, for the one had no intent to do the other any personal mischief (*b*). So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection; as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either mis-

(*t*) Fost. 296.

(*u*) Plut. in Vit. Solon.

(*v*) Ff. 48, 5, 24.

(*x*) Stiern. de Jure Goth. l. 3,

c. 2.

(*y*) 1 Hale, P. C. 486.

(*z*) Sir T. Raym. 212.

(*a*) Vide sup. p. 138.

(*b*) 3 Inst. 56.

[adventure, manslaughter or murder, according to the circumstances under which the original act was done. If it were in a country village where few passengers are, and he call out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning (*c*); and murder, if he knows of their passing, and yet gives no warning at all,—for then it is malice against all mankind (*d*). And in general, when an involuntary killing happens in consequence of an unlawful act; it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tending to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will amount only to manslaughter (*e*).

Next, as to the *punishment* of this degree of homicide. The crime of manslaughter amounts to felony (*f*):] and every person convicted thereof (*g*) may be sentenced, at the discretion of the court, to be kept in penal servitude for life or for a term of not less than three years; or to be imprisoned with or without hard labour for any term not

(*c*) Kel. 40.

(*d*) 3 Inst. 57.

(*e*) Fost. 258; Hawk. P. C. b. 1, c. 31, s. 46. Homicide, however, amounts to murder, if committed in resisting an officer of justice in the lawful execution of his duty, even though there be no felonious intent. Vide post, p. 156.

(*f*) In the particular case of manslaughter by *stabbing*, though done upon sudden provocation, the offence was formerly a *capital* felony. This was by statute 1 Jac. 1, c. 8, which provides, that when one thrusts or stabs another,—the party stabbed not having then a weapon drawn, nor having then first stricken the party

stabbing,—so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. “A statute made,” says Blackstone (vol. iv. p. 193), “on account of the frequent quarrels and stabbings with short daggers, between the Scotch and English at the accession of James I.” But this Act was repealed (as well as the 43 Geo. 3, c. 58, and 1 Geo. 4, c. 90, s. 2, relating to the same subject) by 9 Geo. 4, c. 31.

(*g*) By 22 Vict. c. 33, a party charged with manslaughter on a coroner's inquisition, may be admitted by him to bail.

exceeding two years: or to pay such fine as the court shall award, in addition to or without such other discretionary punishment as aforesaid (*h*).

Secondly. [We are next to consider the crime of deliberate and wilful *murder*; a crime at which human nature starts, and which is perhaps punished almost universally throughout the world with death. The words of the Mosaical law,—over and above the general precept to Noah (*i*), that “whoso sheddeth man’s blood, by man “shall his blood be shed,”—are very emphatical in prohibiting the pardon of murderers. “Moreover, ye “shall take no satisfaction for the life of a murderer, who “is guilty of death, but he shall surely be put to death; “for the land cannot be cleansed of the blood that is “shed therein, but by the blood of him that shed it” (*j*).]

[The name of *murder*, (as a crime,) was antiently applied only to the secret killing of another (*k*); which the word *moërda* signifies in the Teutonic language (*l*). And it was defined “*homicidium quod nullo vidente, nullo sciente, clam perpetratur*” (*m*); for which the vill wherein it was committed,—or, if that were too poor, the whole hundred,—was liable to a heavy amercement, which

(*h*) 24 & 25 Vict. c. 100, s. 5. Besides the punishment of manslaughter considered as a crime, it is attended with a liability to make pecuniary satisfaction to the representatives of the deceased. (Vide sup. vol. III. p. 484.) It may be here also observed (and the remark applies to *all* the felonies mentioned in this chapter with the exception of murder) that by 24 & 25 Vict. c. 100, s. 71, the court may, in its discretion, add to the punishment inflicted, a requisition to give security for keeping the peace.

(*i*) Gen. ix. 6.

(*j*) Numb. xxxv. 31, 33.

(*k*) Dial. de Scacc. l. 1, c. 10.

(*l*) Stiern. de Jure Suecon. l. 3, c. 3. The word *murdre* in the old statutes also signified any kind of concealment or stifling. So in the statute of Exeter, 14 Edw. 1, “*Je riens ne celerai, ne sufferai estre celé, ne murdré,*” which is thus translated into Fleta, l. 1, c. 18, s. 4, “*Nullam veritatem celabo, nec celari permittam, nec murdrari.*” And the words “*pur murdre le droit,*” in the articles of that statute, are rendered in Fleta, ib. s. 8, “*pro jure alicujus murdrando.*”

(*m*) Glanv. l. 14, c. 3.

[amercement itself was also denominated *murdrum* (*n*). This was an antient usage among the Goths in Sweden and Denmark; who supposed the neighbourhood, unless they produced the murderer, to have perpetrated or at least connived at the murder (*o*); and, (according to Bracton,) was introduced into this kingdom by King Canute, to prevent his countrymen, the Danes, from being privily murdered by the English (*p*); and was afterwards continued by William the Conqueror, for the like security to his own Normans (*q*). And therefore if, upon inquisition had, it appeared that the person found slain was an Englishman, (the presentment whereof was denominated *englescherie*,) the country seems to have been excused from this burthen (*r*). But this difference being totally abolished by statute 14 Edw. III. st. 1, c. 4, we must now, (as is observed by Staundforde,) define murder in quite another manner; without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction (*s*).

Murder is therefore now thus defined by Sir Edward Coke (*t*): “When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king’s peace, with malice aforethought, either express or implied (*u*).” The best way of examining the nature of this crime, will be by considering the several branches of this definition.

First, it must be committed by a *person of sound memory and discretion*;] infants under fourteen, lunatics and idiots, [as was formerly observed, are incapable of committing

(*n*) Bract. l. 3, tr. 2, c. 15, s. 7; Stat. Marl. c. 26; Post. 281.

(*o*) Stiern. l. 3, c. 4.

(*p*) L. 3, tr. 2, c. 15.

(*q*) 1 Hale, P. C. 447.

(*r*) Bract. ubi sup.

(*s*) P. C. l. 1, c. 10.

(*t*) 3 Inst. 47.

(*u*) In an indictment for murder, the charge should be that “the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased,” and it is unnecessary to set forth the manner or means. (24 & 25 Vict. c. 100, s. 6.)

[any crime ; unless in such cases where they show a consciousness of doing wrong, and of course a discretion or discernment between good and evil (*x*).

Next, it happens when a person, of such sound discretion, *unlawfully killeth*. The unlawfulness arises from killing without lawful warrant or excuse : and there must also be an actual killing, to constitute murder ;] and not merely an assault with intent to kill (*y*). [The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome (*z*) ; but if a person be indicted for one species of killing,—as by *poisoning*,—he cannot be convicted by evidence of a totally different species of death,—as by shooting with a pistol, or starving. But where they only differ in circumstance ; as if a wound be alleged to be given with a sword, and it proves to have arisen from a staff, an axe or a hatchet ; this difference is immaterial (*a*). Of all species of murder the most detestable is that by poison ; because it can of all others be the least prevented, either by manhood or forethought (*b*) : and, therefore, by the statute 22 Hen. VIII. c. 9, it was made treason ; and a more grievous and lingering kind of death was inflicted for it than the common law allowed, namely,

(*x*) Vide sup. pp. 107—110.

(*y*) 1 Hale, P. C. 425. As to an attempt to murder, &c., vide post, p. 161.

(*z*) It is doubtful whether by our law, the bearing false witness against another, with intent to take away his life, is murder, though he be consequently condemned and executed. (*R. v. Macdaniel*, 1 Leach, 52 ; 1 East, P. C. 333 ; 3 Inst. 48 ; Fost. 131.) But, as Blackstone remarks, (vol. iv. p. 196), the Gothic laws punished in this case, both the judge, the witnesses and the prosecutor

(Stiern. de Jure Goth. l. 3, c. 3), and among the Romans the *lex Cornelia de sicariis*, punished the false witness with death, as being a species of assassination (Ff. 48, 8, 1) ; and there is no doubt, Blackstone adds, that it is equally murder *in foro conscientia* as killing with a sword ; though there may be reason to forbear to punish it as such, to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions.

(*a*) 3 Inst. 135 ; 2 Hale, P. C. 185.

(*b*) 3 Inst. 48.

[boiling to death (*c*); but this Act did not live long, being repealed, by 1 Edw. VI. c. 12.] It is to be observed, that [if a man does an act of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended. As was the case of the unnatural son who exposed his rich father to the air against his will, by reason whereof he died (*d*); of the harlot who laid her child under leaves in an orchard, where a kite struck and killed it (*e*); and of the parish officers who shifted a child from parish to parish, till it died for want of care and sustenance (*f*). So, too, if a man hath a beast that is used to do mischief, and he, knowing it, *suffers* it to go abroad, and it kills a man, even this is manslaughter in the owner; but if he had purposely *turned it loose*,—though barely to frighten people and make what is called sport,—it is with us, as it was in the Jewish law (*g*), as much murder as if he had incited a bear, or a dog to worry them (*h*). If a physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure;] but, by some of the older authorities, [it hath been holden, that if he be not a *regular* physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at the least (*i*). Yet Sir Matthew Hale very justly questions the law of this determination (*k*);] though, on the other hand, it is clear that

(*c*) This extraordinary punishment seems to have been adopted by the legislature, from the peculiar circumstances of the crime which gave rise to it; for the preamble of the statute informs us that John Roose, a cook, had been lately convicted of throwing poison into a large pot of broth prepared for the Bishop of Rochester's family, and for the poor of the parish; and the said John Roose was, by a retrospective clause

of the same statute, ordered to be boiled to death. Lord Coke mentions several instances of persons suffering this horrid punishment.

3 Inst. 48. (Christian's Blackstone.)

(*d*) Hawk. P. C. b. 1, c. 31, s. 5.

(*e*) 1 Hale, P. C. 432.

(*f*) Palm. 545.

(*g*) Exod. xxi. 28, 29.

(*h*) Palmer, 431.

(*i*) Britt. c. 5; 4 Inst. 251.

(*k*) 1 Hale, P. C. 430. See also,

where death is occasioned by gross want of skill, or gross want of care, in the medical man (whether he be regularly licensed or not), it will amount to manslaughter (*l*). It is settled, however, in all cases, that [in order to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which the whole day, upon which the hurt was done, shall be reckoned the first (*m*).

Further: the person killed must be a "*reasonable creature, in being, and under the king's peace*" at the time of the killing. Therefore, to kill an alien, or Jew, or an outlaw, (who are all under the king's peace and protection,) is as much murder as to kill the most regular-born Englishman, except he be an alien enemy in time of war (*n*).] To kill a child in its mother's womb is, on the other hand, not murder, but falls under a different description of crime (*o*).

[Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing: and this malice prepense, *malitia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved and malignant heart (*p*); *un disposition à faire une male chose* (*q*); and it may be either *express* or *implied* in law. Express malice is when one, with a sedate, deliberate mind and formed design, doth kill another; which formed design is evidenced by external circum-

in accordance with Hale and Blackstone, *R. v. Van Butchell*, 3 C. & P. 629; *R. v. Williamson*, ib. 635; *R. v. St. John Long*, 4 C. & P. 398, 423; *R. v. Spiller*, 5 C. & P. 333.

(*l*) *R. v. St. John Long*, ubi sup.; *R. v. Spiller*, ubi sup.

(*m*) Hawk. P. C. b. 1, c. 31, s. 9.

(*n*) 3 Inst. 50; 1 Hale, P. C. 433.

(*o*) 1 Hale, P. C. 433. The un-

lawful administration of poison or other noxious thing, or use of any instrument or other means to procure miscarriage, (either by the woman herself or by another,) is felony by 24 & 25 Vict. c. 100, s. 58, (as to which, vide post, p. 166).

(*p*) Foster, 256.

(*q*) 2 Roll. Rep. 461.

[stances, discovering that inward intention;—as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm (*r*). This takes place in the case of deliberate duelling; where both parties meet avowedly with an intent] to commit homicide(*s*),—thinking it [their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow-creatures; without any warrant or authority from any power either Divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has justly fixed the crime and punishment of murder, on them and on their seconds also (*t*). Yet it requires a great degree of passive valour to combat the dread of even undeserved contempt, arising from the false notions of honour too generally received in Europe.] And, in the opinion of Blackstone, [the strongest prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy custom; till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable, as that which is now given at the hazard of life and fortune, as well of the party insulted, as of him who hath given the insult. Also, if, even upon a sudden provocation, one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*. As when a park-keeper tied a boy that was stealing wood to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar; and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died,—these were justly held to be murders: because the correction being excessive, and such as could not proceed but

(*r*) 1 Hale, P. C. 451.

(*s*) The expression of Blackstone is "to commit murder." (4 Bl. Com. 199.) But it can hardly be said that

this is "the avowed intent."

(*t*) Hawk. P. C. b. 1, c. 31, s. 31. See *R. v. Murphy*, 6 C. & P. 103; *R. v. Young*, ib. 645.

[from a bad heart, it was equivalent to a deliberate act of slaughter (*u*). Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act as shows him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, upon a horse used to strike (*x*); or coolly discharging a gun, among a multitude of people (*y*). So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not, for this is universal malice; and if two or more come together to do an unlawful act against the peace, of which the probable consequence might be bloodshed,—as to beat a man, to commit a riot, or to rob a park,—and one of them kills a man; it is murder in them all, because of the unlawful act, the *malitia præcogitata*, or evil intended beforehand (*z*).

Also, in many cases, where no malice is expressed, the law will imply it. As where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved (*a*); and if a man kills another suddenly, without any or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight, or no apparent, cause. No affront by words or gestures alone is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another (*b*). But if the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to chastise and not to kill him; the law so far considers the provocation of contumelious behaviour, as to adjudge it only manslaughter and not murder (*c*). In like manner, if one kills an officer of justice, either civil or criminal,] while resisting him [in the execution of his duty, and knowing his authority or the

(*u*) 1 Hale, P. C. 454, 473, 474.

(*x*) Lord Raym. 143.

(*y*) Hawk. P. C. b. 1, c. 31, s. 12.

(*z*) Ibid. s. 10.

(*a*) 1 Hale, P. C. 455.

(*b*) Hawk. P. C. b. 1, c. 31, s. 33;

1 Hale, P. C. 455, 456.

(*c*) Foster, 291.

[intention with which he interposes,] or if any of his assistants be killed under the like circumstances, [the law will imply malice, and the killer shall be guilty of murder (*d*);] though it is manslaughter only, if the warrant under which the officer acts be void, or be executed in an unlawful manner (*e*). So, in case of a sudden affray, if a third person interposes to part the combatants, giving them notice of his friendly intention, and either of the combatants kill him in resisting his interposition, it is murder (*f*). [And if one intends to do another felony, and undesignedly kills a man, this is also murder (*g*). Thus, if one shoots at A., and misses *him*, but kills B., this is murder; because of the previous felonious intent, which the law transfers from one to the other:] for the malice, as it has been sometimes expressed, *egreditur personam* (*h*). [The same is the case where one lays poison for A.; and B., against whom the prisoner had no felonious intent, takes it, and it kills him; this is likewise murder (*i*). It were endless to go through all the cases of homicide which have been adjudged, either expressly or impliedly, malicious. These, therefore, may suffice for a specimen; and we may take it for a general rule that all homicide is malicious,—and, of course, amounts to murder,—unless where *justified* by the command or permission of the law; *excused* on account of accident or self-preservation] in sudden quarrel; [or *alleviated* into manslaughter, by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the court and jury; the

(*d*) 1 Hale, P. C. 457; Hawk. P. C. b. 1, c. 31, s. 55; Foster, 270, 308, &c. As to the case of the killing of *private persons*, attempting to apprehend felons, see 2 Hale, P. C. 84; Foster, 272, 309, 318.

(*e*) Hawk. P. C. b. 1, c. 31, ss. 57, 58; Fost. 312.

(*f*) Fost. 272.

(*g*) 1 Hale, P. C. 465.

(*h*) Fost. 262; see Reg. v. Smith, 4 Dearsley's C. C. R. 559.

(*i*) 1 Hale, P. C. 466.

[latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to mitigate or take away the guilt (*l*). For all homicide is supposed to be malicious, until the contrary appeareth upon evidence (*m*).]

The crime of murder, enormous as it is, was in antient times allowed (as also was manslaughter) *the benefit of clergy* (*n*); a commutation of capital punishment, in many cases of capital felony, allowed to persons in holy orders, or, what was equivalent, persons who were able to read,—and once allowed to these only; though it was afterwards extended both to clergy and laity, whether able to read or not, and confined, on the other hand, to capital felonies of the lighter kind. But benefit of clergy was abolished by 7 & 8 Geo. IV. c. 28; having been by several earlier statutes (*o*) long since taken away [from murderers through malice prepense, their abettors, procurers, and counselors (*p*):] and by 24 & 25 Vict. c. 100, s. 1, it is now expressly enacted, that every person convicted of murder shall suffer death as a felon (*q*). [In atrocious cases, it was, at one time, usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place where the crime was committed.] A direction, indeed, which formed no part of the legal judgment; though, at a later period, it was provided, by 25 Geo. II. c. 37, and 9 Geo. IV. c. 31, that the judge might direct the body to be hung in chains. This practice of hanging in chains, [which was quite contrary to the express command of the Mosaical law (*r*),

(*l*) *Fost.* 257; *Hazel's case*, 1 Leach, 406; *R. v. Greenacre*, 8 Car. & P. 35.

(*m*) *Fost.* 255.

(*n*) 4 Bl. Com. 201. As to *benefit of clergy*, see further post, p. 524, n. (*c*).

(*o*) See 23 Hen. 8, c. 1; 1 Edw.

6, c. 12; 4 & 5 Ph. & M. c. 4.

(*p*) 4 Bl. Com. 201.

(*q*) This had previously been provided in similar terms by 9 Geo. 4, c. 31, s. 3, repealed by 24 & 25 Vict. c. 95. Vide post, p. 527, n. (*l*).

(*r*) "The body of a malefactor shall not remain all night upon

[seems to have been borrowed from the civil law; which, besides the terror of the example, gives also another reason, viz. that it is a comfortable sight to the relations and friends of the deceased (r).] By 25 Geo. II. c. 37, moreover, *dissection* was also required to be,—and by 9 Geo. IV. c. 31, might be,—a part of the sentence; and by the same statutes the judge was, in passing sentence, to direct the offender to be executed on the day next but one after that on which it was passed,—unless that day should happen to be Sunday, and then on the Monday following. But all these severities are now laid aside (s). And it is provided by 24 & 25 Vict. c. 100, s. 2, that sentence of death, on every conviction for murder, shall be pronounced and may be carried into execution, and all other proceedings had and taken upon and in respect of such sentence, in the same manner as in other cases which were capital before that Act (t); and (by sect. 3) that the body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined before conviction, and that the sentence of the court shall so direct (u).

[By the Roman law *parricide*, or the murder of one's

“the tree: but thou shalt in anywise bury him that day, that the land be not defiled.”—Deut. xxi. 23.

(r) “*Famosos latrones, in his locis, ubi grassati sunt, furca figendos placuit; ut, et conspectu deterreantur alii, et solatio sit cognatis interemptorum eodem loco pœna reddita, in quo latrones homicidia fecerunt.*”—Ff. 48, 10, 28, s. 15.

(s) By 2 & 3 Will. 4, c. 75, s. 16, so much of the sentence as regards *dissection*, was taken away; and by 4 & 5 Will. 4, c. 26, the *hanging in chains*.

(t) As to *recording* judgment of death, instead of pronouncing sentence, vide post, chap. xxiii.

(u) A similar provision was contained in 6 & 7 Will. 4, c. 30, repealed by 24 & 25 Vict. c. 95. The statutes of George II. and Geo. IV. above cited, had further provided that the offender should be confined in some safe place within the prison, apart from all other persons, and should be fed with bread and water, except only in case of sickness; but this enactment was repealed by 6 & 7 Will. 4, c. 30.

[parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sack, with a live dog, a cock, a viper and an ape, and so cast into the sea(v). Solon, however, in his laws made none against parricide; apprehending it impossible that any one should be guilty of so unnatural a barbarity(x). And the Persians, (according to Herodotus,) entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards(y).] And in like manner our English laws make no particular provision with regard to this crime, so as to distinguish it in any respect from that of simple murder(z). Yet formerly, where a servant killed his master, a wife her husband,—or an ecclesiastical person, (either secular or regular,) his superior, to whom he owed faith and obedience(a),—this was accounted [a species of treason, called *parva proditio* or petit treason(b).] From which it followed that, in the particular case also where a parricide was committed, by one who happened to stand in the relation of servant to his parent, he was guilty of petit treason, though the crime was so ranked under no other circumstances(c). For all these cases involved, in contemplation of law, not only murder, but murder aggravated by a species of treason; on account of the violation of private allegiance(d). [And thus in the antient Gothic

(v) Ff. 41, 9, 9.

(x) Cic. pro S. Roscio, s. 25.

(y) Clio, c. 137.

(z) Blackstone (vol. iv. p. 202) seems inclined to attribute the want of any distinction with regard to parricide in our law, to the same assumption on the part of its founders as is referred to in the text, viz., that of the impossibility of the crime.

(a) "A clergyman," (says Blackstone, vol. iv. p. 203) "is understood

"to owe canonical obedience to the bishop who ordained him—to him in whose diocese he is beneficed—and also to the metropolitan of such bishop,—and therefore to kill any of these is petit treason," and he cites 1 Hale, P. C. 381.

(b) As to petit treason, see 25 Edw. 3, c. 2; 1 Hale, P. C. 380.

(c) 1 Hale, P. C. 380; 4 Bl. Com. 203.

(d) Foster, 107, 324, 336.

[constitutions, we find the breach both of natural and civil relations, ranked in the same class with crimes against the state and the sovereign (e).] Nor was the distinction merely nominal,—the punishment being more exemplary than in the case of simple murder: the sentence for petit treason, in a man, being to be drawn and hanged (f); and, in a woman, to be drawn and burned. But the crime of petit treason is now abolished; it being provided by 24 & 25 Vict. c. 100, s. 8, that such homicides as amounted to that offence before 9 Geo. IV. c. 31 (g), shall be now deemed to be murder only, and no greater offence.

II. *Attempts to murder* (h).—Not only the crime of actual murder, but that of endeavouring to commit it, until very recently, in certain cases, amounted to a capital felony (i). This crime, however, is no longer punishable with death under any circumstances,—and the existing enactments concerning it are contained in 24 & 25 Vict. c. 100; which provides (sect. 11) that whosoever shall administer to (k), or cause to be administered to or be taken by, any person, any poison or other destructive thing; or

(e) "*Omnium gravissima censetur vis, facta ab incolis in patriam, subditis in regem, liberis in parentes, maritis in uxores (et vice versâ), servis in dominos, aut etiam ab homine in semet-ipsam.*"—Stiernh. de Jure Goth. l. 2, c. 3.

(f) 1 Hale, P. C. 382; 3 Inst. 211. Blackstone (vol. iv. p. 203) remarks that this punishment of burning, in the case of the woman, seems to be handed down to us by the laws of the antient Druids; which condemned a woman (see Cæs. de Bell. Gall. l. 6, c. 19) to be burned for murdering her husband. It was, however, the usual punishment (until lately) for all treasons committed by those of the female

sex. Vide post, p. 248.

(g) The statute 9 Geo. 4, c. 31, contained an enactment that homicides, then amounting to petit treason, shall in future be deemed murder only; but that statute was repealed by 24 & 25 Vict. c. 95.

(h) As to a *conspiracy* to commit murder, vide post, c. ix. As to *threatening* murder, vide post, c. x.

(i) Under 7 Will. 4 & 1 Vict. c. 85 (repealed by 24 & 25 Vict. c. 95), attempting to commit murder by poisoning, wounding, &c., was punishable with death.

(k) As to what constitutes an administration of poison, see R. v. Michael, 9 Car. & P. 356.

shall by any means whatsoever wound or cause any grievous bodily harm to any person, with intent in any of the cases aforesaid *to commit murder* (*l*),—shall be guilty of felony, and on conviction may be sentenced to penal servitude for life, or for not less than three years; or to imprisonment for any term not exceeding two years, with or without hard labour and solitary confinement. And by sect. 14, whosoever shall attempt to administer to, or attempt to cause to be administered to or to be taken by, any person, any poison or other destructive thing; or who shall shoot at any person (*m*); or shall by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person; or shall attempt to drown, suffocate or strangle any person;—with intent, in any of the cases aforesaid, *to commit murder*, shall (whether any bodily injury be effected or not) be guilty of felony, and liable to the same punishments as just mentioned. By sect. 13 of the same Act, whosoever shall set fire to, cast away, or destroy, any ship or vessel, with such intent, shall be liable to be similarly punished. And by the 12th section, whosoever by the explosion of gunpowder or other explosive substance, shall destroy or damage any building, with such intent, shall be liable to be similarly punished. Moreover, the same Act contains (sect. 15) a general provision making it felony (and awarding the same punishments as already mentioned) for any person to attempt to commit murder, by any means other than those above specified (*n*).

III. *Acts causing, or tending to cause, danger to life or bodily harm.*

Mayhem, (whence the modern term of *maim*,) is a

(*l*) The jury must be satisfied of the *intention to murder*. See *R. v. Cruise*, 8 Car. & P. 541.

(*m*) See *Reg. v. Smith*, 25 L. J. (M. C.) 29.

(*n*) By 14 & 15 Vict. c. 100, s. 9,

on an indictment charging the actual commission of any felony or misdemeanor, there may be a verdict that the party accused was not guilty of the offence charged, but was guilty of an attempt to commit the same.

civil injury (*o*); consisting, as we may remember, [in the violently depriving another of the use of such of his members, as may render him the less able, in fighting, either to defend himself or to annoy his adversary.] But it is also a heinous crime; and by the antient law of England, he that maimed any man whereby he lost any part of his body was sentenced to lose the like part, *membrum pro membro* (*p*). But this went afterwards out of use: so that by the common law, as it for a long time stood, [mayhem was only punishable with fine and imprisonment (*g*); unless, perhaps, the offence of mayhem by castration, which all our old writers held to be felony; *et sequitur aliquando pœna capitalis, aliquando perpetuum exilium cum omnium bonorum ademptione*" (*r*). And this, although the mayhem was committed on the highest provocation (*s*).]

By different statutes, however, viz. 5 Hen. IV. c. 5, 37 Hen. VIII. c. 6, and 22 & 23 Car. II. c. 1,—called the Coventry Act (*t*),—specific provisions were, in course of time, made against the offence of maiming, cutting off, or disabling a limb or member (*u*). But these statutes also

(*o*) Vide sup. vol. III. pp. 487, 488.

(*p*) 3 Inst. 118. "*Mes, si la pleynte soit faite de femme qu'avera tolle a home ses membres, en tiel case perdra la feme la une meyn per jugement, come le membre dount ele avera trespassse.*"—Brit. c. 55. Blackstone says, (vol. iv. p. 206,) that the law of *membrum pro membro* was in his time still in use in Sweden; and he cites Stiern. l. 3, p. 3.

(*g*) Hawk. P. C. b. 1, c. 44, s. 3.

(*r*) Br. l. 3, tr. 2, c. 23.

(*s*) Sir E. Coke (3 Inst. 62) has transcribed a record of Henry the third's time (Claus. 13 Hen. 3, m. 9), by which a gentleman of Somersetshire and his wife appear to have been apprehended and committed to prison, being indicted for dealing thus with John the monk, who was

caught in adultery with the wife.

(*t*) This Act was occasioned by an assault on Sir John Coventry, in the street, and slitting his nose; in revenge, (as was supposed,) for some obnoxious words uttered by him in parliament. (4 Bl. Com. 206.)

(*u*) The Coventry Act made it a capital felony to disable with intent to maim or to disfigure. On this statute Mr. Coke, a gentleman in Suffolk, and one Woodburn, a labourer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact of slitting the nose of Mr. Crispe, Coke's brother-in-law. The case was somewhat singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked and disfigured with a hedge-

have been repealed, so far as regards the matter in question (*v*); and the provision now in force, viz. the 24 & 25 Vict. c. 100, s. 18, enacts that whosoever shall unlawfully and maliciously by any means whatsoever, wound (*x*) or cause any grievous bodily harm to any person; or shoot at any person (*y*); or by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person (*z*), with intent in any of the above cases *to maim, disfigure or disable, or to do some grievous bodily harm to any person*, or with intent *to resist or prevent the lawful apprehension or detaining of any person*,—shall be guilty of felony, and be liable to the same punishment as for an attempt to murder (*a*). And that even without either of such intents being proved, whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a *misdemeanor*, and liable to penal servitude for three years, or imprisonment with or without

bill; but he recovered. Now the bare attempt to murder was, at common law, no felony; but to disfigure, with an intent to disfigure, is made so by this statute; on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defence upon this point, that the assault was not committed with an intent to disfigure but to murder; and therefore was not within the statute. But the court held, that if a man attacks another to murder him with such an instrument as an hedge-bill, which cannot but endanger the disfiguring him; and in such an attack happens not to kill but only to disfigure him; he may be indicted on this statute: and it may be left to the jury to determine whether it were not a design to murder by disfiguring; and con-

sequently a malicious intent to disfigure as well as to murder. Accordingly the jury found them guilty of such previous intent to disfigure, in order to effect their principal intent to murder; and they were both condemned and executed. (State Trials, vi. 212.)

(*v*) The Coventry Act was repealed by 7 & 8 Geo. 4, c. 27.

(*x*) As to what amounts to “a wounding,” see Jennings’s case, 9 Car. & P. 130.

(*y*) See Smith’s case, 1 Dearsley’s C. C. 559. As to shooting by smugglers, &c., vide post, chap. xi.

(*z*) As to what are to be deemed “loaded arms,” see 24 & 25 Vict. c. 100, s. 19.

(*a*) The punishments which may be awarded for an attempt to murder, are given sup. p. 162.

hard labour not exceeding two years (b). Moreover (by sect. 28) whosoever shall unlawfully and maliciously by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any other grievous bodily harm to any person shall be guilty of felony and be punishable as for an attempt to murder,—with the addition of whipping, if the offender be a male under the age of sixteen, if the court shall so direct. And the same penal consequences will attach to whomsoever shall so cause any gunpowder or explosive substance to explode, or who shall send or deliver to, or cause it or any other offensive, dangerous or noxious thing to be received or taken by any person, or who shall put or lay at any place, or cast or throw at or on, or otherwise apply to any person, any corrosive fluid or destructive or explosive substance with intent (in any of the above cases) to burn, maim, disfigure or disable any person or to do him some grievous bodily harm, *whether any bodily injury be effected or not* (c). And the same punishment, except that the term of penal servitude may not exceed fourteen years, may be inflicted (by sect. 30) on whomsoever shall so place or throw in, into, upon, against or near any building, ship or vessel, any gunpowder or other explosive substance, with intent to do any bodily injury to any person, *whether any explosion take place or bodily injury be inflicted or not*. Moreover, whosoever with intent to *enable himself or any other person to commit, or to assist any other person in committing, any indictable offence*, shall by any means whatsoever attempt to choke, suffocate or strangle any other person, or shall, by any means calculated to choke, suffocate or strangle, attempt to render any other person insensible,

(b) 24 & 25 Vict. c. 100, s. 20. It may be here mentioned (and the remark applies to all of the indictable misdemeanors mentioned in this chapter), that the person convicted may, if the court shall think

fit, either in addition to or in lieu of any other punishment, be fined and required to find sureties to keep the peace, or for good behaviour. (24 & 25 Vict. c. 100, s. 71.)

(c) Sect. 29.

unconscious or incapable of resistance ; or shall unlawfully apply or administer to, or cause to be taken by, or attempt to apply or administer to, or attempt to cause to be administered to or taken by any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter or thing,—shall be guilty of felony, and be punishable as for an attempt to murder(*d*). And whosoever shall unlawfully and maliciously prevent any person on board of, or having quitted any ship or vessel in distress, wrecked or stranded, in his endeavour to save his life ; or who shall so prevent or impede any person in his endeavour to save the life of any such person on board or escaping from such vessel, shall be guilty of felony, and be punishable as for an attempt to murder(*e*). And the same penalties (except that the extreme limit of the term of penal servitude is ten years instead of life) are attached to the crime of so administering or causing to be administered to any person, any poison or other destructive or noxious thing, so as thereby to endanger his life or inflict on him any grievous bodily harm(*f*),—and such administration, though neither life be endangered nor grievous harm inflicted, yet if with intent *to injure, aggrieve or annoy* such person, is a *misdemeanor*—and made punishable with penal servitude for three years, or imprisonment with or without hard labour for not more than two years(*g*).

IV. *Procuring miscarriage*.—To kill a child in the mother's womb is, as formerly observed, no murder(*h*). It was at one period however made by statute(*i*) a capital felony to administer a destructive thing to procure the miscarriage of a woman quick with child ; and if she

(*d*) 24 & 25 Vict. c. 100, ss. 21, 22. As to such punishment, vide sup. p. 162.

(*e*) Sect. 17.

(*f*) Sect. 23. If, on indictment for this felony, the jury are satisfied that the prisoner was guilty of the

misdemeanor mentioned in Sect. 24, they may convict accordingly (sect. 25).

(*g*) Sect. 24.

(*h*) Vide sup. p. 154.

(*i*) 40 Geo. 3, c. 58 ; 9 Geo. 4, c. 31, s. 13.

should not be proved to have been quick with child, it was a felony punishable with transportation. But by a later statute the nature of the offence and the degree of punishment were made no longer to turn on the fact of being *quick* with child, but in all cases penal servitude for life might be awarded (*k*). This offence is now provided against by 24 & 25 Vict. c. 100, s. 58; which awards the term of penal servitude for life, or for a term not less than three years,—or imprisonment (with or without hard labour and solitary confinement) for a term not exceeding two years,—to any woman, being with child, who with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or use any instrument or other means with the like intent; or to any person who, with a similar intent, shall unlawfully administer to any woman, (whether she be with child or not,) or cause to be taken by her any poison or other noxious thing, or use any instrument or other means with intent to procure her miscarriage; and all such practices are declared to be felonies. And further, it is provided that whosoever shall supply or procure any such poison, thing or instrument, knowing that the same is intended to be unlawfully used or employed to procure the miscarriage of any woman, whether with child or not, shall be guilty of a misdemeanor, and punishable with penal servitude for three years, or imprisonment, with or without hard labour, not exceeding two years (*l*).

V. Another offence immediately affecting the personal security of individuals, is that of the *abduction of females*. One species of this offence, [vulgarly called stealing an heiress,]—viz. carrying off any woman against her will, “having substance in goods or lands, or being heir apparent to her ancestor,” (the same being followed by her marriage or defilement),—was made a capital felony by the

(*k*) See 7 Will. 4 & 1 Vict. c. 85, (*l*) 24 & 25 Vict. c. 100, s. 59.
s. 6, repealed by 24 & 25 Vict. c. 95.

statutes 3 Hen. VII. c. 2, and 39 Eliz. c. 9. And by statute 4 & 5 Ph. & M. c. 8, it was also an offence punishable with fine and imprisonment, for any person above the age of fourteen years to carry off any woman child, (unmarried and within the age of sixteen years,) from the possession, and against the will, of her father, mother, guardians or governors; and in case of her defilement or marriage with him, her lands were also to be forfeited to her next of kin during the life of her seducer (*i*). But all these statutes are long since repealed: and the existing provision is contained in 24 & 25 Vict. c. 100; the 53rd section of which enacts, that where any woman of any age shall have any interest, (whether legal or equitable, present or future, absolute, conditional or contingent,) in any real or personal estate,—or shall be an heiress presumptive, or co-heiress, or presumptive next of kin, to any one having such interest,—it shall be felony in any person who shall, from motives of lucre (*j*), take away or detain her against her will, with intent to marry or carnally know her; or who shall cause her to be married or carnally known by any other person—or who (with a like intent) shall fraudulently allure; take away or detain any such woman *under the age of twenty-one*, out of the possession and against the will of of her father or mother, or other person having the lawful care or charge of her; and the offender (in any of the above cases) is punishable by penal servitude for fourteen years, or not less than three, or by imprisonment with or without hard labour, not exceeding two years: and shall, moreover, be incapable of taking any of the estate, interest or property of such woman; which (if marriage has taken place) shall be settled in such manner as the Court of Chancery shall appoint. And the same punishments are awarded, to whom-

(*i*) As to the forfeiture of the property of the woman, in the case of a marriage between persons, either of whom is under age, by licence or banns procured by the false oath

or fraud of one of the parties, vide sup. vol. II. pp. 264, 272.

(*j*) As to what is evidence of *motives of lucre*, see *R. v. Barratt*, 9 Car. & P. 387.

soever shall *by force* take away or detain against her will any woman of *any* age, with a similar intent (*k*). While unlawfully to take or cause to be taken out of the possession and against the will of her parents or guardian, though no such intent as above mentioned can be shown, any unmarried girl under the age of sixteen, is *a misdemeanor*, punishable with imprisonment to the extent of two years, with or without hard labour (*l*).

VI. Another [offence, also against the female part of the subjects of the realm, but attended with greater aggravations than that of forcible marriage, is the crime of *rape*, *raptus mulierum*, or the carnal knowledge of a woman forcibly and] against her consent (*m*). [This, by the Jewish law, was punished with death, in case the damsel was betrothed to another man: and in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel's father; and she was to be the wife of the ravisher all the days of his life, without that power of divorce which was in general permitted by the Mosaic law (*n*).

The civil law punishes the crime of ravishment with death and confiscation of goods; under which it includes both the offence of forcible abduction or taking away a woman from her friends, of which we last spoke, and also the present offence of forcibly dishonouring them; either of which, without the other, is in that law sufficient to constitute a capital crime (*o*). Also the stealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether she consent

(*k*) 24 & 25 Vict. c. 100, s. 54.

(*l*) 24 & 25 Vict. c. 100, s. 55. See *R. v. Meadows*, 1 Car. & Kir. 399; *R. v. Robins*, ib. 456; *Manklelow's case*, 1 Dearsley's C. C. R. 159; *Reg. v. Timmins*, 9 W. R. (C. C. R.) 56. It may be remarked that in these cases, the girl's *consent* is immaterial.

(*m*) *The Queen v. Fletcher*, 28 L. J. (M. C.) 85. Blackstone's expression (vol. iv. p. 210), is "against her will." But the above case shows that the definition of this crime given in the text, is the proper one.

(*n*) Deut. xxii. 28.

(*o*) Cod. 9, tit. 13.

[or is forced; “*sive volentibus, sive nolentibus mulieribus, tale facinus fuerit perpetratum.*” And this, in order to take away from women every opportunity of offending in this way; whom the Roman law supposes never to go astray without the seduction and arts of the other sex; and therefore, by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honour of the women. “*Si enim ipsi raptores metu, vel atrocitate pœnæ, ab hujusmodi facinore se temperaverint, nulli mulieri, sive volenti, sive nolenti, peccandi locus relinquetur; quia hoc ipsum velle mulierum, ab insidiis nequissimi hominis, qui meditatur rapinam, inducitur. Nisi etenim eam sollicitaverit, nisi odiosis artibus circumvenierit, non faciet eam velle in tantum dedecus sese prodere.*” But our English law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only; and therefore makes it a necessary ingredient, in the crime of rape, that it must be against the woman’s consent.

Rape was punished by the Saxon laws, (particularly those of king Athelstan,) with death (*p*); which was also agreeable to the old Gothic or Scandinavian constitution (*q*). But this was afterwards thought too hard; and in its stead another severe, but not capital, punishment, was inflicted by William the Conqueror; viz., castration and loss of eyes (*r*); which continued till after Bracton wrote, in the reign of Henry the third. But in order to prevent malicious accusations, it was then the law (*s*), that the woman should, immediately after, “*dum recens fuerit maleficium,*” go to the next town; and there make discovery to some credible persons of the injury she has suffered; and, afterwards, should acquaint the high constable of the hundred, the coroners, and the sheriff, with the outrage (*t*). This

(*p*) Bracton, l. iii. c. 28.

(*q*) Stiernh. de Jure Sueon. l. iii. c. 2.

(*r*) L.L. Guil. Conqu. c. 19.

(*s*) The law is so laid down by Hale, in respect of appeals of rape

in his time. (1 Hale, P. C. 632.)

As to *appeals* (a mode of prosecution now abolished), vide post, c. XVIII.

(*t*) Glanv. l. xiv. c. 6; Bract. l. iii. c. 28.

[seems to correspond in some degree with the laws of Scotland and Arragon,] which, (as cited by Blackstone,) require [that complaint must be made within twenty-four hours; though afterwards the time of limitation, in England, was extended to forty days (*u*). At present there is no time of limitation fixed; for, as it is now punished by indictment at the suit of the Crown, the maxim of law takes place that *nullum tempus occurrit regi*; but the jury will rarely give credit to a stale complaint. During the former period, also, it was held for law (*v*), that the woman, by consent of the judge and her parents, might redeem the offender from the execution of his sentence, by accepting him for her husband,—if he also was willing to agree to the exchange, but not otherwise.

In the third year of Edward the first, (by the statute Westm. 1, c. 13,) the punishment of rape was much mitigated: the offence itself of ravishing a damsel within age, that is, *twelve* years old, either with her consent or without, or of any other woman against her will, being reduced to a trespass, if not prosecuted by appeal within forty days; and subjecting the offender only to two years' imprisonment and a fine at the king's will. But this lenity being productive of the most terrible consequences, it was, in the thirteenth year of Edward the first, found necessary to make the offence of forcible rape, felony (*x*). And by statute 18 Eliz. c. 7, it was made felony without benefit of clergy.] All these enactments were afterwards repealed by 9 Geo. IV. c. 31; which however still made the offence a capital felony: but by the provision now in force, every person convicted of the felonious crime of rape shall be liable to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour (*y*).

[A male infant under the age of fourteen years, is pre-

(*u*) See 3 Ed. 1, c. 13.

(*y*) 24 & 25 Vict. c. 100, s. 48.

(*v*) Hawk. P. C. b. 1, c. 41, s. 7.

(*x*) Stat. Westm. 2, c. 34.

9 Geo. 4, c. 31, was repealed by 24 & 25 Vict. c. 95.

[sumed by law incapable to commit a rape; and therefore it seems cannot be found guilty of it (*z*); for though in other felonies *malitia supplet ætatem*, as has in some cases been shown, yet as to this particular species of felony, the law supposes an imbecility of body as well as mind (*a*).

The civil law seems to suppose a prostitute, or common harlot, incapable of any injuries of this kind (*b*); not allowing any punishment for violating the chastity of her who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment: and therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life (*c*); for, as Bracton well observes, "*licet meretrix fuerit antea, certe tunc meretrix non fuit, cum reclamando nequitie ejus consentire noluit* (*d*)."

As to the material facts requisite to be given in evidence and proved upon an indictment for rape, they are of such a nature that, though necessary to be known and settled for the conviction of the guilty and preservation of the innocent,—and therefore to be found in such criminal treatises as discourse of these matters in detail,]—yet it is not desirable to discuss them here. [We shall therefore merely add upon this head, a few remarks from Sir Matthew Hale, with regard to the competency and credibility of witnesses, which may, *salvo pudore*, be considered.

And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony and how far she is to be believed, must be left to the jury upon the circumstances of fact that concur

(*z*) R. v. Jordan, 9 Car. & P. 118.
The law is the same in the case of an assault with intent to commit a rape. R. v. Eldershaw, 3 Car. & P. 396.

(*a*) 1 Hale, P. C. 631.

(*b*) Cod. 9, 9, 22; Ff. 47, 2, 39.

(*c*) 1 Hale, P. C. 629; Hawk. P. C. b. 1, c. 41, s. 2.

(*d*) L. 3, c. 27.

[in that testimony. For instance, if the witness be of good fame; if she presently discovered the offence and made search for the offender; if the party accused fled for it;—these and the like are concurring circumstances, which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed, was where it was possible she might have been heard and she made no outcry;—these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.] It is to be observed, that she is not compellable, on her examination, to answer the question whether she has not had connection with other men (*e*); but if she replies in the negative, the accused is then at liberty to call persons to contradict her (*f*). And he is allowed to show that he had himself had connection with her before the alleged rape (*g*), or that her character for chastity or decency is notoriously bad (*h*).

[Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness if she hath sense and understanding to know the nature and obligations of an oath, or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it is thought by Sir M. Hale that she ought to be heard without oath, to give the court information (*i*): and others have held that what the child told her mother or other relations may be given in evidence, since the nature of the case admits frequently of no better proof. But it is now settled that no hearsay evidence can be given of the declarations of a child who hath not

(*e*) *R. v. Hodgson*, R. & R. C. C. 211.

(*f*) *R. v. Robins*, 2 Mood. & R. 512; *R. v. Barker*, 3 Car. & P. 589; *Roscoe's Evidence on Criminal*

Cases, 6 ed. p. 810.

(*g*) *R. v. Martin*, 6 Car. & P. 562.

(*h*) *Stark. Ev.* 1269, 1270.

(*i*) 1 Hale, P. C. 634.

[capacity to be sworn, nor can such child be examined in court without oath (*j*); and that there is no determinate age at which the oath of a child ought either to be admitted or rejected. Yet where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place and circumstances. In order to make out the fact, and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion.] For in this, as in other cases, a witness may be [competent, that is, may be admitted to be heard, and yet, after being heard, may prove not to be credible or such as the jury is bound to believe; for one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact (*k*).

“It is true,” says the learned judge just referred to, “that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easy to be made, and hard to be proved, but harder to be defended by the party accused, though innocent.” Sir M. Hale then relates two very extraordinary cases of malicious prosecution for this crime that had happened within his own observation, and concludes thus: “I mention these instances that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses (*l*).”]

(*j*) *R. v. Brasier*, 1 Leach, C. L. 237.

(*k*) The remarks here made are equally applicable to the case where

a party is charged with the crime next mentioned, viz. that of abusing a child.

(*l*) 1 Hale, P. C. 635.

VII. Next to rape may be classed the crime of *defilement or abuse of children*. For, first, it is a felony punishable with penal servitude for life, or not less than three years, or imprisonment (with or without hard labour) for not more than two years, unlawfully and carnally to know and abuse any girl under the age of *ten years*, even though she consent (*m*): and, secondly, it is a misdemeanor punishable by penal servitude for three years or imprisonment with or without hard labour to the extent of two years, so to know and abuse any girl above the age of *ten* and under *twelve* (*n*),—even though she consent. Moreover, punishment by imprisonment as last mentioned may be inflicted on any person who shall be convicted of any *attempt* to have carnal knowledge of a girl under the age of twelve—even though she consent (*o*); and also, on whomsoever shall by false pretences or representations or other fraudulent means commit the misdemeanor of procuring any female under the age of twenty-one, to have illicit carnal connexion with any man (*p*).

VIII. What has been observed in the case of rape,—[especially with regard to the manner of proof, which ought to be the more clear in proportion as the crime is the more detestable,—may be applied to another offence, of a still deeper malignity, the infamous *crime against nature*, committed either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for, if false, it deserves a punishment inferior only to that of the crime itself.

(*m*) 24 & 25 Vict, c. 100, s. 50.

(*n*) Sect. 51.

(*o*) Sect. 52. As to the crime of abusing children, see *R. v. Hughes*, 1 Cox, Cr. C. 247; *R. v. Ashbolt*, 2

Cox, Cr. C. 115; *R. v. Martin*, 9 Car. & P. 213; *R. v. Neale*, 1 Car. & Kir. 391; *R. v. Holcroft*, 2 Car. & Kir. 341.

(*p*) Sect. 49.

[We will not act so disagreeable a part as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more expedient to imitate in this respect the delicacy of our English law, which treats it as a crime not fit to be named; *peccatum illud horribile, inter Christianos non nominandum* (r).] A taciturnity observed likewise by the edict of Constantius and Constans (s); “*ubi scelus est id quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis pœnis subdantur infames qui sunt, vel qui futuri sunt, rei.*”]

In our own country [this offence, (being in the times of popery only subject to ecclesiastical censures,) was made felony without benefit of clergy by statute 25 Hen. VIII. c. 6, (revived and confirmed by 5 Eliz. c. 17),] and until very recently remained a capital offence (t). It is, however, now enacted by 24 & 25 Vict. c. 100, s. 61, that every person convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be kept in penal servitude for life, or not less than ten years. [And the rule of law herein is, that, if both are arrived at years of discretion, *agentes et consentientes pari pœnâ plectantur* (u).] Moreover, (by sect. 62), whosoever shall *attempt* to commit this crime, or shall be guilty of an assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, punishable with penal servitude for ten or not less than three years, or imprison-

(r) See in Rot. Parl. 50 Edw. 3, n. 58, a complaint that a Lombard did commit the sin “that was not to be named.” 12 Rep. 37.

(s) Cod. 2, 9, 31.

(t) It was capital under 9 Geo. 4, c. 31, now repealed by 24 & 25 Vict. c. 95. Its punishment (says Blackstone, vol. iv. p. 216) “the voice of

“nature and of reason, and the express law of God (Levit. xx. 13, “15), determine to be capital; of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven.”

(u) 3 Inst. 59.

ment, with or without hard labour, not exceeding two years (*x*).

IX. *Kidnapping and child stealing*. — The forcible [stealing away of a man, woman or child from their own country, and sending them into another, was capital by the Jewish (*y*)] and also by the civil law (*z*). [This is unquestionably a very heinous crime, as it robs the sovereign of his subjects, banishes a man from his country, and may, in its consequences, be productive of the most cruel and disagreeable hardships; and therefore the common law of England punished it with fine and imprisonment (*a*).] But with respect to the stealing of children, our modern law is reasonably much more severe; it being provided by 24 & 25 Vict. c. 100, s. 56, that whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of *fourteen* years (*b*), with intent to deprive any parent, guardian or other person having the lawful care or charge of such child, of its possession, or with intent to steal any article on its person;—or shall, with any such intent as aforesaid, receive or harbour such child, knowing the same to have been so stolen or enticed;—shall be guilty of felony: and he is made liable to penal servitude for not more than seven or less than three years, or to be imprisoned, with or without hard labour, for any term not more than two

(*x*) It is to be noticed that by 22 & 23 Vict. c. 17, no indictment shall be preferred to, or any found by, the grand jury charging an indecent assault, without security for the due prosecution of the charge, unless the indictment be directed by a judge, &c.

(*y*) Exod. xxi. 16.

(*z*) Ff. 48, 15, 1. In the civil law the offence of spiriting away and

stealing men and children was called *plagium*, and the offenders *plagiarii*. (Ib.)

(*a*) Raym. 474; 2 Show. 221; Skin. 47; 4 Bl. Com. 219.

(*b*) In the analogous provision contained in 9 Geo. 4, c. 31, s. 21 (now repealed), the age was fixed at *ten* years. As to the abduction of an unmarried girl under the age of *sixteen*, vide sup. p. 169.

years; and also, if a male under the age of sixteen, to be whipped, if the court shall so think fit (*c*).

X. The offence of *abandoning* young children has also been provided against by the same statute; and it is enacted, that, whosoever shall unlawfully abandon or expose any child under the age of two years, in such manner that its life shall be endangered, or its health permanently injured or likely to be so, shall be guilty of a misdemeanor, and punishable by penal servitude for three years, or imprisonment, with or without hard labour, for a term not exceeding two years (*d*).

XI. *Unlawfully endangering railway passengers.* Whosoever shall unlawfully and maliciously put or throw on or across a railway any wood, stone or other thing; or displace any rail, sleeper or other thing, or turn any point of machinery belonging to a railway; or show, hide or remove any signal or light; or do any other thing, with intent to endanger the safety of any person travelling or being on such railway (*e*)—or shall throw against or into any railway engine or carriage any wood, stone or other thing, with intent to endanger the safety of any person being in or upon the same (*f*)—he shall, in any of the above cases, be guilty of felony: and he is liable to penal servitude for life, or not less than three years; or to be imprisoned, with or without hard labour, for any term not exceeding two years (*g*). And moreover, whosoever by any unlawful act, or wilful omission or neglect, shall endanger or cause to be endangered, or aids or assists in endangering

(*c*) A person claiming a right to the possession of the child, or to be the father or its mother, is not within the above provision (24 & 25 Vict. c. 100, s. 56).

(*d*) 24 & 25 Vict. c. 100, s. 27.
See *R. v. Cooper*, 1 Den. C. C. 459;
R. v. Hogan, 2 Den. C. C. 277; *R.*

v. Gray, 26 L. J. (N. S.) M. C. 203.

(*e*) 24 & 25 Vict. c. 100, s. 32.
In cases under this section, the offender, if a male under the age of sixteen, may be also sentenced to be whipped.

(*f*) Sect. 33.

(*g*) Sects. 32, 33.

or in causing to be endangered, the safety of any person conveyed by or being on a railway, shall be guilty of a misdemeanor, and punishable, with or without hard labour, to the extent of two years (*h*).

XII. *Setting spring-guns or engines to destroy or injure trespassers.* It is enacted by the same Act, that whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent to destroy such life or inflict such harm, upon a trespasser or other person coming in contact therewith,—shall be guilty of a misdemeanor, and be punishable with penal servitude for three years, or imprisonment with or without hard labour, to the extent of two years (*i*).

There is, however, a proviso, that the said enactment shall not extend to gins or traps such as are usually set with the intent of destroying vermin; or to spring-guns, man-traps, or other engines, set in a dwelling-house for the protection thereof from sunset to sunrise (*k*).

XIII. The remaining offences which fall under the subject of this chapter are, *assaults, batteries, and false imprisonment.* With regard to the nature of these offences in general, we have nothing further to add to what has been already observed in the preceding book of these Commentaries; [when we considered them as civil injuries, for which a satisfaction is given to the party

(*h*) 24 & 25 Vict. c. 100, s. 34. See *R. v. Bradford*, 29 L. J. (N. S.), M. C. 171.

(*i*) 24 & 25 Vict. c. 100, s. 31. Prior to 7 & 8 Geo. 4, c. 18, s. 1 (repealed by 24 & 25 Vict. c. 95), a man was not indictable for the mere act of placing such instruments on his premises with intent to destroy trespassers, at least if he gave

sufficient notice to the public that they were so placed. (*Elott v. Wilks*, 3 B. & Ald. 312, 314.) As to the right of *action* by a person who sustains injury from an engine of this description, see *Jordan v. Crump*, 8 Mee. & W. 782; *Wootton v. Dawkins*, 2 C. B. (N. S.) 412.

(*k*) 24 & 25 Vict. c. 100, s. 31.

[aggrieved (*l*). But taken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also] misdemeanors; and if thereby actual bodily harm has been thereby occasioned, they are punishable by penal servitude for three years, or imprisonment to the extent of two years, with or without hard labour (*m*); or in cases of common assault, with imprisonment with or without hard labour, to the extent of one year (*n*). But they are punished in a much severer manner and degree, [when they are committed with any very atrocious design,—as in case of an assault with intent to murder (*o*),] or with an intent to commit an unnatural crime (*p*): for which last intentional assault, an indictment is more usual than for the absolute perpetration of the fact itself, on account of the difficulty of proof (*q*). [When, however, both parties are consenting to an unnatural attempt, it is usual not to charge any *assault*, but that one of them laid hands on the other with intent to commit, and that the other permitted the same with intent to suffer the commission of, the abominable crime before mentioned.]

There are also many other species of aggravated assaults for the punishment of which provision is expressly made by Act of Parliament (*r*). Thus an assault on a magistrate,

(*l*) Vide sup. vol. III. pp. 487, 488.

(*m*) 24 & 25 Vict. c. 100, s. 47.

(*n*) Ibid. Before this provision "hard labour" could not be inflicted for a common assault.

(*o*) The extreme term of penal servitude may, in such case, be for life. Vide sup. p. 162.

(*p*) Vide sup. pp. 176, 177.

(*q*) Vide sup. p. 177, n. (*x*).

(*r*) See also the following provisions:—6 & 7 Will. 4, c. 50, s. 4, as to assaulting or resisting a metropolitan police patrol: 5 & 6 Vict. c. 29, s. 21, as to assaults by con-

victs on the officers of Pentonville Prison: 6 & 7 Vict. c. 26, s. 19, as to assaults by convicts on the officers of the Millbank Prison: 13 & 14 Vict. c. 101, s. 9, as to assaults on workhouse or relieving officers: 17 & 18 Vict. c. 104, s. 206, as to masters of British ships wrongfully forcing a seaman or apprentice ashore, or leaving him behind, &c.: 24 & 25 Vict. c. 100, s. 39, as to assaults with intent to obstruct the sale or free passage of grain: Ibid. s. 40, as to assaults on seamen and others, with intent to prevent them from working at their trades.

or any other person lawfully authorized, in the exercise of his duty in preserving wreck or goods cast on shore, is a misdemeanor punishable with penal servitude to the extent of seven years, or imprisonment to the extent of two years, at the discretion of the court (*q*). While to obstruct, assault or arrest on civil process a clergyman while in the discharge of his duties (*r*); or to assault any person with intent to commit felony; or any peace officer in the due execution of his duty, or any person acting in his aid, or with intent to resist or prevent a lawful apprehension or detainer (*s*); or to assault any person in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or in respect of any trade, business or manufacture (*t*),—are all misdemeanors, punishable by two years' imprisonment, with or without hard labour. And whosoever shall be convicted of any indecent assault upon a female, is liable to imprisonment to the same extent (*u*).

We may observe that many common assaults may be, and continually are, disposed of by the justices of the peace sitting at petty sessions, in the exercise of their summary jurisdiction, and not by way of indictment; and that, in such cases, the punishment consists in a fine not exceeding £5, or imprisonment (with or without hard labour) to the extent of two months (*v*); and, in certain cases, even some species of aggravated assaults may be heard and determined by the justices. But, for further information hereon, we must refer the reader to the chapter on Summary Convictions, in a subsequent part of the work (*x*).

(*q*) 24 & 25 Vict. c. 100, s. 37.

(*r*) Sect. 36.

(*s*) Sect. 38.

(*t*) Sect. 41.

(*u*) Sect. 52. As to security being

required for the due prosecution of such charge, before preferring indictment, vide sup. p. 177, n. (*1*).

(*v*) Sect. 42.

(*x*) Vide post, chap. xv.

CHAPTER V.

OF OFFENCES AGAINST PROPERTY.



THE next class of offences that we propose to consider are such as affect *property*; in considering which we shall notice, first, the habitations of individuals; and, next, property in general: and, as regards property in general, shall arrange the different offences under the general heads of larceny; malicious mischief; forgery; obtaining property by false personation; and obtaining property by false pretences.

And, first, with respect to offences against the habitations of individuals.

I. *Arson, ab ardendo*, (as it stood at common law, and independently of the provisions of recent Acts of Parliament to be presently mentioned,) is [the malicious and wilful burning of the house or outhouse of another man. This is an offence of very great malignity, and much more pernicious to the public than simple theft; because, first, it is an offence against that right of habitation which is acquired by the law of nature, as well as of the laws of society; next, because of the terror and confusion that necessarily attend it; and, lastly, because in simple theft the thing stolen only changes its master, but still remains *in esse* for the benefit of the public: whereas, by burning, the very substance is absolutely destroyed. It is also frequently more destructive than murder itself, of which, too, it is often the cause: since murder, atrocious as it is, seldom ex-

[tends beyond the felonious act designed ; whereas fire too frequently involves, in the common calamity, persons unknown to the incendiary, and not intended to be hurt by him ; and friends as well as enemies. For which reason the civil law punishes with death, such as maliciously set fire to houses in towns and contiguous to others ; but is more merciful to such as only fire a cottage or house standing by itself (a).

Our English law also distinguishes with much accuracy upon this crime ; and, therefore, we will inquire, first, what is such a house as may be the subject of this offence ; next, wherein the offence itself consists, or what amounts to a burning of such house ; and, lastly, how the offence is punished.

Not only the bare dwelling-house, but all outhouses that are parcel thereof,—though not contiguous thereto, nor under the same roof,—as barns and stables, may be the subject of arson (b). And this, by the common law ; which also accounted it felony to burn a single barn in the field, if filled with hay or corn, though not parcel of the dwelling-house (c) : and the burning of a stack of corn, was antiently likewise accounted arson (d).] The offence of arson, [strictly so called, may be committed by wilfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt ; but if no mischief be done but to one's own, it] did not, at common law, [amount to felony, though the fire was kindled with intent to burn another's (e). For, by the common law, no intention to commit a felony, amounts to the same crime ; though it now does, in some cases, by particular statutes. However, such wilful firing one's house, *in a town*,] was always [a high misdemeanor ; and punishable by fine, imprisonment, and perpetual sureties

(a) Ff. 48, 19, 28, s. 12.

(b) 1 Hale, P. C. 567.

(c) 3 Inst. 67.

(d) Hawk. P. C. b. 1, c. 39, s. 2.

(e) Cro. Car. 377 ; 1 Jon. 351.

[for the good behaviour (*g*): and, if a landlord or reversioner set fire to his own house, of which another was in possession under a lease from himself, or from those whose estate he hath,] it was accounted arson; [for, during the lease, the house is the property of the tenant (*h*).]

As to what shall be said to be a *burning* so as to amount to arson, at common law [a bare intent, or attempt to do it, by actually setting fire to a house, unless it absolutely burns, does not fall within the description of *incendit et combussit*; which were words necessary, in the days of law-Latin, to all indictments of this sort (*i*); but the burning and consuming of any part is sufficient, though the fire be afterwards extinguished (*k*). Also it must be a *malicious* burning, otherwise it is only a trespass; and, therefore, no negligence or mischance amounts to it (*l*).

The *punishment* of arson was death by our antient Saxon laws (*m*); and in the reign of Edward the first this sentence was executed by a kind of *lex talionis*; for the incendiaries were burnt to death (*n*), as they were also by the Gothic constitutions (*o*). The statute 8 Hen. VI. c. 6, made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason; but it was again reduced to felony, by the general Acts of Edward the sixth and Queen Mary.] Moreover [the offence of arson was denied the benefit of clergy by statute 23 Hen. VIII. c. 1. But that statute was repealed by 1 Edw. VI. c. 12: and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference and deduction from the statute 4 & 5 Ph. & M. c. 4, which expressly denied it to an accessory before the fact (*p*).]

(*g*) 1 Hale, P. C. 568; Hawk. P. C. b. 1, c. 39, s. 3, ubi sup.; 2 East, P. C. c. 21, s. 7.

(*h*) Fost. 115.

(*i*) R. v. Russell, 1 Car. & M. 541.

(*k*) Hawk. P. C. b. 1, c. 39, ss. 16, 17.

(*l*) 1 Hale, P. C. 569.

(*m*) LL. Inæ, c. 7.

(*n*) Britt. c. 9.

(*o*) Stiern. De Jure Goth. l. 3, c. 6.

(*p*) 11 Rep. 35; 2 Hale, P. C. 346, 347; Fost. 336; and see 9

The offence which we have here described is that of arson as it stood at *common law*; but the doctrines of the common law on this subject have now lost much of their importance, this species of mischief being specially provided against by statute, in reference to almost every case of arson. These provisions are as follows.

By 24 & 25 Vict. c. 97, s. 2 (*q*), whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony; and shall be liable to penal servitude for life, or not less than three years, or to imprisonment for not more than two years, with or without hard labour, or solitary confinement; and if the offender be a male under the age of sixteen, with or without whipping (*r*). And the same punishments are attached (by sect. 1) to the felonious offence of so setting fire to any church, chapel, meeting-house, or other place of divine worship (*s*);—and (by sect. 3), if with intent to injure or defraud any person, to that of so setting fire to any house, stable, coach-house, outhouse (*t*), warehouse, office, shop, mill, malthouse, hopoast, barn, storehouse, granary, pens, shed, or fold; or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, whether in possession of the offender or any other person (*u*);—and (by sect. 4) to the felonious

Geo. 1, c. 22, now repealed by 7 & 8 Geo. 4, c. 27.

(*q*) By 24 & 25 Vict. c. 95, the provisions with regard to this species of arson, contained in 7 Will. 4 & 1 Vict. c. 89, s. 2, are repealed. By that Act, the punishment was death.

(*r*) In this and all other felonies punishable under 24 & 25 Vict. c. 97, the offender may in addition to any other punishment be required to find sureties for keeping the peace,

or in default additional imprisonment to the extent of one year. (24 & 25 Vict. c. 97, s. 73.)

(*s*) Sect. 1.

(*t*) As to what is an “outhouse,” see *R. v. James*, 1 Car. & Kir. 303; *R. v. England*, *ibid.* 533.

(*u*) The previous provisions as to this, contained in 7 Will. 4 & 1 Vict. c. 89, s. 3, and 7 & 8 Vict. c. 62, are repealed by 24 & 25 Vict. c. 95.

offence of so setting fire to any station or other building belonging to any railway, port, dock, harbour, canal, or other navigation(*v*); or (by sect. 5) to any building (other than those already specified) belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish or place, or belonging to any university, or college or hall thereof, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution.

As to other buildings not specified, the offence of so setting fire to them, is somewhat less penal; being a felony punishable with penal servitude to the extent of fourteen years instead of life, or else by such imprisonment as already mentioned (*x*).

It is also enacted that it shall be felony, and punishable as the offence last mentioned, in whomsoever shall by any overt act *attempt* so to set fire to any building, or to any matter or thing being in, against, or under any building, under such circumstances that if the building were thereby set fire to, the offence would amount to felony (*y*).

With regard to firing other than that of *buildings*,—it is enacted that unlawfully and maliciously to set fire to any *stack* of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of other cultivated vegetable produce, or stack of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood or bark, or steer of wood or bark, shall be equally penal as setting fire to any of the buildings above specified (*z*); but the punishment, if by way of penal servitude, is limited to the term of *fourteen years*, in the case of so setting fire to any *crop* of hay, grass, corn, grain or pulse, or cultivated vegetable produce, whether standing or cut down, or to

(*v*) The previous enactment as to this, contained in 14 & 15 Vict. c. 19, s. 8, is repealed by 24 & 25 Vict. c. 95.

(*x*) 24 & 25 Vict. c. 97, s. 6.

(*y*) Sects. 7, 8.

(*z*) Sect. 17.

any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze or fern, wheresoever the same may be growing (*a*); and to the term of *seven years*, if the offence be *attempted* by overt act and not completed,—under such circumstances, that, if the setting on fire were effected, the offender would be guilty of felony (*b*).

Finally, so to set fire to any *coal mine* (*c*),—or to any *ship* or *vessel* (*d*),—is made equally penal with setting fire to a building specified in the Act. And an attempt to do so by an overt act, is little less penal, the term of penal servitude being in that case fourteen years (*e*).

II. [*Burglary*, or nocturnal housebreaking, *burgi latrocinium*, which, by our antient law, was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence.] For it obviously involves many of the same circumstances of atrocity that belong to arson; as infringing both upon the right of habitation, and in general also upon the right of property; as occasioning a frightful alarm, and as leading by natural consequence to murder. Its malignity also is the more strongly illustrated, by considering how particular and tender a regard is paid by the law of England [to the immunity of a man's house; which it styles his castle, and will never suffer to be violated with impunity: agreeing herein with the sentiments of antient Rome, as expressed in the words of Tully, "*quid enim sanctius, quid omni religione munitius, quam domus unuscujusque civium* (*f*)?" For this reason no outward doors can, in general, be broken open to execute any civil process; though, in criminal cases, the public safety supersedes the private. Hence, also, in part arises the animadversion of the law upon eaves-droppers, nui-

(*a*) 24 & 25 Vict. c. 97, s. 16.

(*b*) Sect. 18.

(*c*) Sect. 26.

(*d*) Sects. 42, 43.

(*e*) Sect. 27.

(*f*) Pro Domo, 41.

[sancers and incendiaries; and to this principle it must be assigned, that a man may assemble people together lawfully, (at least if they do not exceed eleven,) without danger of raising a riot, rout or unlawful assembly, in order to protect and defend his house (*e*); which he is not permitted to do in any other case.

The definition of a burglar, as given us by Sir Edward Coke, is “he that by night breaketh and entereth into a “mansion-house, with intent to commit a felony (*f*).”] In which, however, we are to understand, as it would seem, the mansion-house of another person; for a man cannot be guilty of burglary in his own house (*g*). [In this definition there are four things to be considered—the *time*, the *place*, the *manner*, and the *intent*.

The *time* must be by night, and not by day; for in the daytime there is no burglary. We have seen in the case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the assailant with impunity (*h*). As to what is reckoned night and what day for this purpose,—antiently, the day was accounted to begin only at sunrising, and to end immediately upon sunset;] but the better opinion afterwards was, that if there were daylight or *crepusculum* enough, begun or left, to discern a man’s face withal, it was no burglary (*i*). But this did not extend to moonlight, for then many midnight burglaries would have gone unpunished; [and besides the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night, when all the creation are at rest.] But the doctrines of the common law on this subject are no longer of practical importance, it being provided by 24 & 25 Vict. c. 96, (by which this offence is

(*e*) 1 Hale, P. C. 547. As to riots, routs, and unlawful assemblies, vide post, c. vi.

(*f*) 3 Inst. 63.

(*g*) 2 East, P. C. c. 15, s. 18.

(*h*) Vide sup. p. 134.

(*i*) 3 Inst. 63; 1 Hale, P. C. 550; Hawk. P. C. b. 1, c. 38, s. 2.

now regulated,) that, for the purposes of that Act, the night shall be deemed to commence at nine in the evening, and to conclude at six in the morning of the succeeding day (*k*).

[As to the *place*. It must be, according to Sir E. Coke's definition, in a *mansion-house*; and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes, that it is *domus mansionalis Dei* (*l*). But it does not seem absolutely necessary that it should, in all cases, be a mansion-house; for it may also be committed by breaking the gates or walls of a *town* in the night; though that perhaps Sir Edward Coke would have called, the mansion-house of the garison or corporation. Spelman defines burglary to be "*nocturna diruptio alicujus habitaculi, vel ecclesiæ, etiam murorum portarumve civitatis aut burgi, ad feloniam aliquam perpetranda* (*m*).]" And therefore we may safely conclude that the requisite of its being *domus mansionalis*, is only in the burglary of a private house, which is the most frequent; and in which it is indispensably necessary, to form its guilt, that it must be in a mansion or dwelling-house; for no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle or defence: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi*, is the object of burglary, though no one be in it at the time of the fact committed (*n*).] And it was formerly the rule,

(*k*) 24 & 25 Vict. c. 96, s. 1. The previous enactment on this subject, contained in 7 Will. 4 & 1 Vict. c. 86, s. 4, was repealed by 24 & 25 Vict. c. 95.

(*l*) 3 Inst. 64.

(*m*) Spelm. Gloss. tit. "Burglary;" Hawk. P. C. b. 1, c. 38, s. 10.

(*n*) 1 Hale, P. C. 556; Fost. 77.

that if the barn, stable, or warehouse, were parcel of the mansion-house, and within the same common fence (*p*), (though not under the same roof, or contiguous,) a burglary might be committed therein; for the capital house protected and privileged all its branches and appurtenances, if within the curtilage or homestall. But now it is provided, that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be a part of such dwelling-house for the purpose of burglary, unless there shall be a *communication* between such building and dwelling-house; either immediate, or by means of a covered and inclosed passage leading from one to the other (*q*). [A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is to all other purposes, as well as this, the mansion-house of the owner (*r*). So also is a room or lodging in any private house the mansion for the time being of the lodger, if the owner doth not himself dwell in the house, or if he and his lodger enter by different outward doors (*s*); but if the owner himself lies in the house, and hath but one outward door at which he and his lodgers enter, such lodgers seem only to be inmates; and all their apartments, to be parcel of the own dwelling-house of the owner (*t*). Thus, too, the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers (*u*). But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there, it is no dwelling-house, nor can bur-

(*p*) *R. v. Garland*, 1 Leach, C. L. 171.

(*q*) 24 & 25 Vict. c. 96, s. 53, re-enacting 7 & 8 Geo. 4, c. 29, s. 13, which is repealed by 24 & 25 Vict. c. 95.

(*r*) 1 Hale, P. C. 556; Hawk. P.

C. b. 1, c. 38, s. 13.

(*s*) See *R. v. Rogers*, 1 Leach, C. C. 89; *R. v. Trapshaw*, *ibid.* 427.

(*t*) Kel. 84; 1 Hale, P. C. 556.

(*u*) *Fost.* 38, 39; 2 East, P. C. c. 15, s. 14.

[glary be committed therein; for by the lease it is severed from the rest of the house, and therefore it is not the dwelling-house of him who occupies the other part; neither can I be said to dwell therein, when 'I never lie there (*x*). Neither can burglary be committed in a tent or booth erected in a market or fair, though the owner may lodge therein (*y*); for the law regards thus highly nothing but permanent edifices—a house or church, the wall or gate of a town: and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon under the same circumstances.

As to the *manner* of committing burglary, there must be both a breaking and an entry to complete it: but they need not be both done at once (*z*); for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars (*a*). There must in general be an actual breaking,—not a mere legal *clausum fregit*, by leaping over invisible, ideal boundaries, which may constitute a civil trespass, but a substantial and forcible irruption,—as at least by breaking, or taking out the glass of, or otherwise opening, a window; picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner hath provided. But if a person leaves his doors or windows open, it is his own folly and negligence; and if a man enters thercin, it is no burglary; yet if he afterwards unlocks an inner or chamber door, it is so (*b*). But to come down a chimney is held a burglarious entry, for that is so much closed as the nature of things will admit. So also to knock at a door, and upon opening it to rush in with a felonious intent; or, under pretence of

(*x*) 1 Hale, P. C. 558.

(*y*) Hawk. P. C. b. 1, c. 38, s. 17.

(*z*) R. v. Bird, 9 Car. & P. 44;

R. v. Smith, R. & R. C. C. 417.

(*a*) 1 Hale, P. C. 551.

(*b*) Ibid. 553.

[taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house: all these entries have been adjudged burglarious, though there was no actual breaking: for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process (*c*). And so if a servant opens and enters his master's chamber door, with a felonious design; or if any other person lodging in the same house, or in a public inn, opens and enters another's door with such evil intent; it is burglary. Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both (*d*); for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease, rather aggravates than extenuates the guilt. As for the entry, any the least degree of it with any part of the body, or with an instrument held in the hand, is sufficient: as, to step over the threshold, to put a hand or hook in at the window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries (*e*). The entry may be before the breaking as well as after;] for though there were once different opinions upon the question, whether breaking *out* of a house to escape, by a man who had previously entered by an open door with intent to steal, were burglary, [Lord Bacon (*f*) holding the affirmative and Sir Matthew Hale (*g*) the negative,] it is now enacted that [whosoever shall enter the dwelling-house of another with

(*c*) Hawk. P. C. b. 1, c. 38, s. 5.

(*d*) Cornwall's case, Stra. 881; 1 Hale, P. C. 553.

(*e*) 1 Hale, P. C. 555; Hawk. P. C. b. 1, c. 38, s. 7; Fost. 108. As to what entries are burglarious, see the following cases; R. v. Bailey, R. & R. C. C. 341; R. v. Russell, 1 M. C. C. R. 377; R. v. Davis,

R. & R. C. C. 355; R. v. Brice, ib. 450; R. v. Haines, ib. 451. And as to what are *not*, see R. v. Lawrence, 4 Car. & P. 231; R. v. Smith, R. & M. C. C. R. 178; R. v. Rust, ib. 183; R. v. Roberts, Car. C. L. 293.

(*f*) Bac. Elem. 65; and see 2 East, P. C. c. 15, s. 6.

(*g*) 1 Hale, P. C. 554.

intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary (*h*). [But it is universally agreed that there must be both a breaking, either in fact or by implication, and also an entry,—in order to complete the burglary.]

As to the *intent*. It is clear that, except where the commission of a felony in the dwelling-house is connected with the crime in a different manner, as in the instance above given, [such breaking and entry must be with a felonious intent, otherwise it is only a trespass (*i*). And it is the same whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary, whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law or only created so by statute,—since that statute which makes an offence felony, gives it incidentally all the properties of a felony at common law.

Thus much for the nature of burglary; which was a felony at common law, but within the benefit of clergy (*h*). The statutes, however, of 1 Edw. VI. c. 12, and 18 Eliz. c. 7, took away clergy from the principals; and that of 3 & 4 Will. & M. c. 9, from all abettors and accessories before the fact.] And though these provisions were repealed some time since (*l*), yet by those in force up to a

(*h*) 24 & 25 Vict. c. 96, s. 51. A similar enactment was formerly contained in 12 Ann. c. 7 (repealed by 7 & 8 Geo. 4, c. 27), and afterwards in 7 & 8 Geo. 4, c. 29 (repealed by 24 & 25 Vict. c. 95).

(*i*) 1 Hale, P. C. 561.

(*k*) Blackstone remarks, (vol. iv. p. 227,) that by the laws of Athens, which punished no simple theft with death, burglary was a capital crime, and cites Pott. Antiq. b. i. c. 26.

(*l*) By 7 & 8 Geo. 4, c. 27. Provisions as to the punishment of

recent period, viz., by 7 Will. IV. & 1 Vict. c. 86, burglariously to break and enter into any dwelling-house, and to assault with intent to murder any person being therein; or to stab, cut, wound, beat, or strike any such person, was a felony, punishable with death. But this Act is now repealed (*l*); and by 24 & 25 Vict. c. 96, s. 52, whosoever shall be convicted of the crime of burglary, shall be liable to penal servitude for life, or any term not less than three years; or to be imprisoned for any term not more than two years; and, in the case of imprisonment, hard labour and solitary confinement may be superadded.

In connection with the crime of burglary it may be mentioned, that whosoever shall enter any dwelling-house *in the night*, with intent to commit a felony, shall be guilty of felony, and punishable with penal servitude to the extent of seven years, or imprisonment as above specified (*m*). And that whosoever shall be found *by night*, armed with any dangerous or offensive weapon or instrument, with intent to break or enter any building, and to commit felony therein: or shall be found by night in the possession, without lawful excuse, of any housebreaking implement; or with his face blackened or disguised, with intent to commit any felony: or shall be found by night in any building, with intent to commit a felony therein:—shall be guilty of a *misdemeanor*, punishable with penal servitude for three years, or imprisonment (with or without hard labour) not exceeding two years: and, in case of a second conviction, or if convicted after a previous conviction for felony, is liable either to such imprisonment, or to penal servitude to the extent of ten years (*n*).

burglary, were also made by 7 & 8 Geo. 4, c. 29; but these were repealed by 7 Will. 4 & 1 Vict. c. 86.

(*l*) By 24 & 25 Vict. c. 95.

(*m*) 24 & 25 Vict. c. 96, s. 54.

(*n*) Sects. 58, 59, re-enacting 14 & 15 Vict. c. 19, ss. 1 and 2. As to the construction of which, see *R. v.*

Oldham, 21 L. J. (M. C.) 134; *R. v. Bailey*, 1 Dearsley's C. C. R. 249. By stat. 5 Geo. 4, c. 33, s. 4, it is also provided, that persons in possession of housebreaking implements with intent to break into a house, shall be deemed *rogues and vagabonds*, and punished accordingly.

III. *Sacrilege* and *housebreaking* are offences which are now regulated by 24 & 25 Vict. c. 96,—by which it is provided, that the same penal consequences as are provided by that Act with respect to *burglary(o)*, shall attach to whomsoever shall break and enter any church, chapel, meeting-house or other place of divine worship, and commit any felony therein,—or, being in such place, shall commit any felony therein, and break out of the same(*p*). This constitutes the crime of sacrilege, and is breaking into the House of God. It is consequently more penal than to break into other buildings; for where the breaking and entry is into or out of any dwelling-house, school-house, shop, warehouse or counting-house,—or into or out of any building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof(*q*),—the extreme limit of the term of penal servitude which may be inflicted is *fourteen years*, instead of for life(*r*).

Moreover it is also a felony, and punishable either by imprisonment as in the previous cases, or by penal servitude for seven or not less than three years, to break and enter any dwelling-house, church, chapel, meeting-house or other place of divine worship, or any building within the curtilage, or any school-house, shop, warehouse or counting-house, *with intent* to commit any felony therein, although such felony shall not in fact have been effected(*s*).

Having now considered offences against the habitations of individuals, we proceed, in the second place, to consider offences in respect of property in general.

(*o*) Vide sup. p. 194.

(*p*) 24 & 25 Vict. c. 96, ss. 50, 52.

(*q*) No building, although within the curtilage of a dwelling house and occupied therewith, is to be deemed part thereof for any of the purposes of the 24 & 25 Vict. c. 96, unless there be a communication either immediate or by means of a covered

and enclosed passage (sect. 53).

(*r*) 24 & 25 Vict. c. 96, ss. 55, 56.

(*s*) Sect. 57. See *The Queen v. McPherson*, 26 L. J. (N. S.) M. C. 134. By 14 & 15 Vict. c. 100, s. 9, a verdict of guilty of an attempt to commit felony may be given on an indictment charging the actual commission of a felony.

I. *Larceny*, or theft (by contraction for *latrocinium*), is the unlawful taking and carrying away of things personal, with intent to deprive the right owner of the same (*q*); and it is either simple, or accompanied with circumstances of aggravation (*r*).

The offence of *simple* larceny, or plain theft, [certainly commenced, then, whenever it was, that the bounds of property, or laws of *meum* and *tuum*, were established. How far such an offence can exist in a state of nature, where all things are held to be in common, is a question that may be solved with very little difficulty. The disturbance of any individual in the occupation of what he has seized to his present use, seems to be the only offence of this kind incident to such a state. But unquestionably, in social communities, when property is established, any violation of that property is subject to be punished by the laws of society, though how far that punishment shall extend is matter of considerable doubt.] At present we will examine the nature of theft, or larceny, as laid down in the foregoing definition.

In the first place, it must be an *unlawful taking*, which implies that the goods must pass from the possession of the right owner (*s*), and without his consent (*t*): and therefore where there is no change of possession, or a change of it by consent; or a change from the possession of a person without title, to that of the right owner (*u*);—there can, in any of those cases, be no larceny. And, as the taking must be without the consent of the owner, so in general [no delivery of the goods from the owner

(*q*) The definition of Blackstone (vol. iv. p. 229) is, "the felonious taking and carrying away of the personal goods of another." But this leaves it to be inquired, what kind of taking and carrying away is considered as felonious.

(*r*) Larceny, accompanied with circumstances of aggravation, is described as being *compound*, *mixed* or

complicated, as to which vide post, p. 207.

(*s*) 1 Hale, P. C. 513.

(*t*) 4 Bl. Com. 230.

(*u*) But if a person has temporary title against the permanent owner, the latter may be guilty of larceny in taking them. *R. v. Wilkinson*, R. & R. C. C. 470; 4 Bl. Com. 231.

[to the offender, upon trust, can ground a larceny. As if A. lends B. a horse, and he rides away with him.] Yet if the delivery be obtained from the owner by a person having *animus furandi* at the time, and who afterwards unlawfully appropriates the goods in pursuance of that intent, it is larceny; as if, in the case above supposed, B. solicited the loan of the horse, with intent to steal him (*x*). But in such cases, [bare non-delivery shall not of course be intended to arise from a felonious design; since that may happen from a variety of other accidents.] So a person who has received goods by delivery from the owner, will nevertheless be guilty of larceny by appropriating them, if they were delivered under such circumstances as not to divest the owner of the legal possession (*y*); as when a servant embezzles his master's plate (*z*), or the guest at an inn or tavern makes away with the articles of which he has the temporary use (*a*). Also, by a special enactment of the statute law, whoever shall steal any chattel or fixture let to be used by him in any house or lodging, may be tried on a charge of simple larceny, and having been convicted of such felony, may be punished accordingly (*b*). • And any bailee of any chattel, money or valuable security, who shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, shall be guilty of larceny,—although he shall not break bulk or otherwise determine the bailment (*c*).

Again, [there must not only be a taking, but a *carrying*

(*x*) Major Semple's case, 2 Leach. 469, 470. See *Queen v. Poyser*, 20 L. J. (M. C.) 191. •

(*y*) Reed's case, 2 Dearsley's C. C. R. 168, 257.

(*z*) Christian's Blackstone, vol. iv. p. 230 (note); 1 Hale, P. C. 506.

(*a*) Hawk. P. C. b, 1, c. 33; s. 6; 4 Bl. Com. 231.

(*b*) 24 & 25 Vict. c. 96, s. 74. As to the punishment of simple larceny,

vide post, p. 204. The above provision is framed on the previous enactment of 7 & 8 Geo. 4, c. 29, s. 45, (now repealed,) which adopted it from 3 Will. & M. c. 9, also now repealed.

(*c*) 24 & 25 Vict. c. 96, s. 3, re-enacting 20 & 21 Vict. c. 54, s. 4, which is repealed by 24 & 25 Vict. c. 95.

[*away* ; *cepit et asportavit* was the old law-Latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact ; or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs ; these have been adjudged sufficient carryings away to constitute a larceny (*d*) : or, if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it, this is larceny (*e*).]

Further, this taking and carrying away must be of *personal goods*. [Lands, tenements and hereditaments, either corporeal or incorporeal,] either freehold or less than freehold, [cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold,—as corn, grass, trees and the like, or lead upon a house,—no larceny could be committed by the rules of the common law ; but the severance of them was merely a trespass ; which depended on a subtlety, in the legal notions of our ancestors. These things were parcel of the real estate ; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immoveable (*f*). And if they were severed by violence, so as to be changed into moveables, and at the same time, by one and the same continued act, carried off by the person who severed them ; they could never be said to be taken from the *proprietor* in this their newly-acquired state of mobility, (which is essential to the nature of larceny,) being never, as such, in the actual or constructive possession of any one but him who committed the trespass. He could not, in strictness, be said to have taken what at that time were the personal goods of another ;

(*d*) 3 Inst. 108, 109.

(*e*) As to the application of this doctrine, see *White's case*, 1 Dears-

ley's C. C. R. 203.

(*f*) Vide sup. vol. II. p. 230 et seq.

[since the very act of taking, was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and comes again at *another* time, when they are so turned into personalty, and takes them away, it is larceny] at the common law; [and so it is, if the owner, or any one else has severed them (*g*).] So, [upon nearly the same principle, the stealing of writings relating to real estate is] at common law, [no felony, but a trespass (*h*); because they concern the land,—or, according to our technical language, *savour of the realty*,—and are considered as part of it by the law: so that they] come to the heir or devisee [together with the land which they concern (*i*). Bonds, bills and notes, (which concern mere *choses in action* (*h*),) were also, at the common law, held not to be such goods whereof larceny might be committed; being of no intrinsic value, and not importing any property in *possession* of the person from whom they are taken (*l*).] By the common law also, [larceny could not be committed of treasure trove, or wreck, till seized by the Crown or him who hath the franchise; for till such seizure, no one hath a determinate property therein:] nor could it be committed, at the common law, [of such animals in which there is no property either absolute or qualified; as of beasts that are *feræ naturæ*, and unreclaimed, such as deer, hares and conies in a forest, chase or warren; fish in an open river or pond; or wild fowls at their natural liberty (*m*). But if such animals are reclaimed or confined, and may serve for food, it is otherwise; for of deer so inclosed in a park that they may be taken at pleasure, of fish in a trunk, and of pheasants

(*g*) 3 Inst. 109; 1 Hale, P. C. 510.

(*h*) Hale, ubi sup.; R. v. West-beer, Stra. 1137.

(*i*) Vide sup. vol. II. p. 237.

(*k*) See Reg. v. Watts, 1 Dearsley's C. C. R. 326.

(*l*) 8 Rep. 33 b.

(*m*) 1 Hale, P. C. 511; Fost. 366.

[or partridges in a mew, larceny at common law, may be committed (*n*).] It is also said (*o*) [that if swans be lawfully marked, it is felony] at common law [to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond; otherwise it is only a trespass. But of all valuable domestic animals, as horses and other beasts of draught; and of all animals *domitæ naturæ*, which serve for food, as neat or other cattle, swine, poultry and the like; and of their fruit or produce taken from them while living, as milk or wool (*p*),—larceny may be committed] at common law; as it may also [of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed (*q*).] While, on the other hand, as [to those animals which do not serve for food, and which therefore the law holds to have no intrinsic value,—as dogs of all sorts (*r*), and other creatures kept for whim and pleasure,—though a man may have a bare property therein, and maintain a civil action for the loss of them (*s*); yet they are not of such estimation as that the crime of stealing them amounts to the common law offence of larceny (*t*).]

Lastly, the taking and carrying away must be *with intent to deprive the right owner*; or, as it is frequently expressed, *animo furandi* (*u*). [This requisite, besides excusing those who labour under incapacities of mind or

(*n*) Hawk. P. C. b. 1, c. 33, s. 25; 1 Hale, P. C. 511. As to *pigeons*, see *Queen v. Cheafor*, 21 L. J. (M. C.) 43.

(*o*) Dalt. Just. c. 156.

(*p*) Dalt. 21; Crompt. 36; Hawk. P. C. b. 1, c. 33, s. 28; 1 Hale, P. C. 511; *The King v. Martin*, (by all the judges,) P. 17 Geo. 3.

(*q*) 1 Hale, P. C. 511.

(*r*) In accordance with this doctrine it has been held that (under the statute 7 & 8 Geo. 4), there could not be a conviction for obtaining a dog *under false pretences*. (The

Queen v. Robinson, 18 L. J. (M. C.) 58.)

(*s*) 1 Hale, P. C. 512. Vide sup. vol. II. pp. 7, 8.

(*t*) 1 Hale, P. C. 512. The preceding paragraph, it will be observed, relates only to larceny, or *theft at the common law*. But by modern statutes, the stealing of many things which were at common law not the subject of larceny, is now highly penal. Vide post, p. 205.

(*u*) The civil law expresses this by the words "*lucri causâ*."—Inst. lib. iv. tit. 1, par. 1.

[will, of whom we spoke sufficiently at the entrance of this Book (*x*), indemnifies also mere trespassers and other petty offenders. As if a servant takes his master's horse without his knowledge, and brings him home again,—if a neighbour takes another's plough that is left in the field, and uses it upon his own land, and then returns it,—if, under colour of owner of rent where none is due, I distress another's cattle or seize them,—all these are trespasses, but no felonies (*y*). The ordinary discovery of a felonious intent, is where the party doth it clandestinely; or being charged with the fact, denies it. But this is by no means the only criterion of criminality; for in cases that may amount to larceny, the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent or *animus furandi* (*z*); wherefore they must be left to the due and attentive consideration of the court and jury.]

It is to be observed, that larceny may be committed as to a thing whereof the owner is *unknown* (*a*), provided it appear that there is some person, other than the taker, in whom the ownership resides (*b*). [In like manner, as, among the Romans, the *lex Hostilia de furtis* provided that a prosecution for theft, might be carried on without the intervention of the owner (*c*).] An example of this may occur in the case of [stealing a shroud out of a grave; which is the property of those, whoever they were, that buried the deceased: but stealing the corpse itself, which has no

(*x*) Vide sup. p. 96.

(*y*) 1 Hale, P. C. 509.

(*z*) To offer to the owner his own property for sale as the goods of another person,—the seller having wrongfully taken the goods,—has been decided to amount to larceny. See *Reg. v. Hall*, 1 Den. C. C. 381; *Manning's case*, 1 Dearsley's C. C. R. 21.

(*a*) 1 Hale, P. C. 512; 2 Hale, P. C. 290.

(*b*) Thus a man may be guilty of larceny if *finding* property *animus furandi*, he appropriates the same to his own use without taking any steps to discover the owner. [See *R. v. Christopher*, 28 L. J. (M. C.) 35.]

(*c*) *Gravin*. l. 8, c. 106.

[owner, though a matter of great indecency,] and, if the corpse be disinterred for the purpose, an indictable misdemeanor (*d*), [is no felony unless some of the grave-clothes be stolen with it.]

[Having thus considered the general nature of simple larceny at common law, we now arrive at its punishment. Theft, by the Jewish law, was only punished with a pecuniary fine and satisfaction to the party injured (*e*). And in the civil law, till some very late constitutions, we never find the punishment capital. The laws of Draco, at Athens, punished it with death: but his laws were said to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct. And so the Attic laws in general continued, except that once, in a time of dearth, it was made capital to break into a garden and steal figs; but this law, and the informers against the offence, grew so odious, that from them all malicious informers were styled *sycophants*, a name which we have much perverted from its original meaning (*f*).] In this country, [our antient Saxon laws nominally punished theft with death, if above the value of twelve pence; but the criminal was permitted to redeem his life by a pecuniary ransom; as, amongst their ancestors the Germans, by a stated number of cattle (*g*). But in the ninth year of Henry the first, this power of redemption was taken away;] and all persons guilty of larceny above the value of twelve pence, were directed to be hung (*h*). So that stealing to above this value, (which was

(*d*) Vide post, c. XII. Blackstone remarks (vol. iv. p. 235), that by the law of the Franks, a person who dug a corpse up, in order to strip it, was to be banished from society; and no one suffered to relieve his wants till the relatives of the deceased consented to his readmission; and he cites Montesq. Sp. L. b. 30, c. 19.

(*e*) Exod. xxii.

(*f*) Petit. LL. Attic. l. 7, tit. 5.

(*g*) Tac. de Mor. Germ. c. 12.

(*h*) This sum (says Blackstone, vol. iv. p. 237) was the standard in the time of King Athelstan; and he observes that afterwards, in the reign of King Henry the first, one shilling was the stated value, at the Exchequer, of a pasture fed ox (Dial. de Scacc. l. 1, s. 7); and that if we

called *grand larceny*,) became a felony absolutely capital, and so continued to our own times(*i*): while *petit larceny*, that is, theft to inferior amount, (though also described as felony,) was punished with imprisonment or whipping only(*k*). However, by the law relating to *benefit of clergy*(*l*), as latterly modified, persons who committed simple larceny only, though to the amount of more than twelve pence, (or indeed to any amount whatever,) were in fact excused the pains of death, provided it were the first offence; and provided the benefit of clergy had not been taken away from the particular species of theft by some express statute, as was very frequently the case(*m*): and, when the capital punishment was thus taken away, were formerly liable to be burnt in the hand or whipped, or, in more modern times, to be whipped, or transported for seven years: which latter punishment might also latterly be inflicted, (in lieu of the common law penalties,) on persons convicted of *petit larceny*(*n*). And such was the state of the law on this subject as late as the year 1827; when, it was provided, by 7 & 8 Geo. IV. c. 29, that every person convicted of *simple larceny* of any amount, (all distinctions between grand and petit larceny being at the same time abolished), should be liable either to transportation or imprisonment(*o*). But the punishment of transportation for persons convicted of simple larceny was taken away by later Acts, so far at least as a first offence

should suppose this shilling to mean that *solidus legalis* mentioned by Lyndewoode (Prov. l. 3, c. 13), or the 72nd part of a pound of gold, it would be equal to 13s. 4d. of the present standard.

(*i*) The progressive reduction in the value of money, while death continued to be the sentence for theft to the same amount as before, justified the complaint of Sir H. Spelman (Gloss. 350), that while everything else living became dearer,

the life of man had continually grown cheaper.

(*k*) 3 Inst. 218; Hawk. b. 1, c. 33, s. 36; 4 Bl. Com. 237.

(*l*) Vide post, c. xxiii.

(*m*) 4 Bl. Com. 237.

(*n*) 4 Geo. 1, c. 11; 19 Geo. 3, c. 74; 4 Bl. Com. 236, 237.

(*o*) This Act was repealed by 24 & 25 Vict. c. 95; but the distinction between grand and petit larceny is again abolished, by 24 & 25 Vict. c. 96, s. 2.

was concerned. By the provisions now in force, the punishment for simple larceny, or of any felony made punishable like simple larceny, is (as the general rule) penal servitude for *three* years or imprisonment not exceeding two years, with or without hard labour and solitary confinement(*o*); and in the case of a male under sixteen years, with or without whipping(*p*); but in case of a conviction after having been twice “summarily convicted” of any of the offences so punishable under certain Acts(*q*),—or after a conviction for an indictable misdemeanor, punishable under 24 & 25 Vict. c. 96(*r*),—the term of penal servitude may be *seven* years(*s*); and in case of a conviction after a previous conviction for felony (either on indictment or by way of summary conviction), the term of penal servitude may be as long as *ten* years(*t*). In certain cases, moreover, where the larceny relates to a subject for which the policy of the law provides with more anxiety, the punishment may be even more severe. For if any person shall steal, (to the value of ten shillings,) any woollen, linen, hempen or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca or mohair; or of one or more of those materials mixed with each other, or mixed with any other material;—whilst laid, placed, or exposed, during any stage, process or progress of manufacture, in any building, field or other place,—the term of penal servitude which may at the discretion of the court be given instead of mere imprisonment, is extended to *fourteen* years(*u*). So, also, whosoever shall steal any horse, mare, gelding, colt or filly; or any bull, cow, ox, heifer or calf; or any

(*o*) But in certain cases, the offence of simple larceny may be summarily disposed of before justices at petty sessions, (or before a metropolitan or stipendiary magistrate.) Vide post, chapter on Summary Convictions.

(*p*) 24 & 25 Vict. c. 96, s. 4.

(*q*) These are 7 & 8 Geo. 4, cc. 29, 30; 10 & 11 Vict. c. 82; 24 & 25 Vict. c. 97.

(*r*) 24 & 25 Vict. c. 96, s. 8.

(*s*) Sect. 9.

(*t*) Sect. 7.

(*u*) Sect. 62, re-enacting in substance 7 & 8 Geo. 4, c. 29, s. 16.

ram, ewe, sheep or lamb, is punishable by penal servitude to the extent of *fourteen*, or not less than three years, or by imprisonment with or without hard labour and solitary confinement to the extent of two years (*v*).

The additional severity in these instances, is owing to the difficulty there would otherwise be in preserving goods so easily carried off (*w*). [Upon which principle the Roman law punished more severely than other thieves the *abigei*, or stealers of cattle (*x*); and the *balnearii*, or such as stole the clothes of persons who were washing in the public baths (*y*): both which constitutions seem to be borrowed from the laws of Athens (*z*). And so, too, the antient Goths punished, with unrelenting severity, thefts of cattle or corn that was reaped and left on the field; such kind of property, which no human industry can sufficiently guard, being esteemed under the peculiar custody of Heaven (*a*).]

The offence which we have been hitherto considering is that of simple larceny *at common law*, but in connection with this offence, and proper for consideration under the same head, is the crime of *simple stealing* (or *theft*) of *things* not *the subject of larceny at common law*. For in progress of time, it was found necessary to extend the protection of the penal laws to many of those subjects, of which the antient law of larceny took no account: and Acts of Parliament were accordingly passed, from time to time, by which punishments were imposed for thefts committed in respect of various kinds of property so circum-

(*v*) 24 & 25 Vict. c. 96, s. 10, re-enacting 7 & 8 Geo.⁴, c. 29, s. 25. See also 24 & 25 Vict. c. 96, s. 11, as to wilfully killing *any* animal (the stealing whereof would have amounted to felony), *with intent to steal* the carcase, &c.; sects. 12—16, as to unlawfully carrying away, &c., *deer* kept in forests, &c.; sect.

17, as to unlawful taking of *rabbits*; sect. 23, of *pigeons*; and sects. 24, 25, of *fish*.

(*w*) Vide sup. p. 103.

(*x*) Ff. 47, t. 14.

(*y*) Ib. t. 17.

(*z*) Pott. Antiq. b. 1, c. 26.

(*a*) Stiern. de Jure Goth. l. 3, c. 5.

stanced: and though these statutes have been since repealed, the same general object has been pursued in the recent Act (24 & 25 Vict. c. 96), which has been passed to consolidate the statute law “relating to larceny and other similar offences”(a). By this Act (b) provisions are made against stealing “valuable securities,”—such as bonds, bills and the like (c)—and numerous other subjects of property, of which the enumeration will be found in a note below (d); so that it may be laid down in general terms, that stealing has now become an offence, liable to punishment or penalty, in regard to all moveables whatever. We may also remark, with respect to the kinds of stealing thus created by statute in supplement to the antient law of larceny, that all the common law doctrines relative to larceny which we have already had occasion to notice, are in general applicable to thefts of this description also (e), though they are not technically denominated larcenies (f); and that their punishment is, in many cases, identical. In several instances, however, they do not amount, like larceny at common law, to a felony, but to

(a) Some of the provisions of this Act are also pointed at the fraudulent or improper destruction of the subjects of property; and (in the case of animals) against the killing *with intent* to steal them.

(b) This statute is to a certain extent based on a previous Act, having the same general design, and nearly the same title, viz., the 7 & 8 Geo. 4, c. 29, which (so far as the united kingdom is concerned), is repealed by the 24 & 25 Vict. c. 95.

(c) 24 & 25 Vict. c. 96, ss. 1, 27. See *R. v. Smith*, 1 Dearsley's C. C. R. 561.

(d) See 24 & 25 Vict. c. 96, ss. 18—20, as to *dogs*; ss. 21, 22, as to *birds and animals ordinarily kept in*

confinement; s. 26, as to *oysters*; s. 27, as to *valuable securities not being part of title to lands*; s. 28, as to *documents of title to lands*; s. 29, as to *wills*; s. 30, as to *records and legal documents*; s. 31, as to *fixtures*; ss. 32, 33, as to *trees*; ss. 34, 35, as to *fences*; s. 36, as to *fruit*; s. 37, as to *garden produce*; ss. 38, 39, as to *ores*. A variety of antecedent statutes, passed with the same object of supplying the defects of the antient law in this particular, and noticed by Blackstone, (vol. iv. p. 233, &c.,) were repealed by 7 & 8 Geo. 4, c. 27.

(e) *R. v. St. John*, 7 C. & P. 324.

(f) See *R. v. Gooch*, 8 C. & P. 293.

a misdemeanor only; and there are others of them not assignable to the class either of felony or misdemeanor; but restrained by fixed pecuniary penalties only, recoverable, in a summary way, before a justice of the peace (*g*).

We have seen that larceny may not only be simple, but combined with circumstances of aggravation; which is described in our books as mixed, compound, or complicated larceny (*h*); and this is not only, like simple larceny, felonious, but is felony of a more penal character. We will therefore now consider,

1. Larceny in a dwelling-house. [This species of theft, though it seems to have a higher degree of guilt than simple larceny, yet was not at all distinguished from the other at common law (*i*); unless where it was accompanied with the circumstance of breaking the house by night, and then it fell under another description, viz., that of burglary.] But afterwards, by several Acts of Parliament,—[the history of which is very ingeniously deduced by a learned modern writer (*k*), who hath shown them to have gradually arisen from our improvements in trade and opulence,]—the benefit of clergy was taken from larcenies committed in a house in almost every instance; so that the capital sentence, to which they were subject as larcenies, took effect. These Acts, however, are all now repealed, and this crime is now regulated by 24 & 25 Vict. c. 96, ss. 60, 61 (*l*). By the first of these provisions, whosoever shall steal in any dwelling-house, any chattel, money, or valuable security to the value of *five pounds* or more, shall be liable to penal servitude for fourteen years, or not

(*g*) Vide post, chapter on Summary Convictions. &c.

(*h*) 4 Bl. Com. 239; Hawk. P. C. b. 1, cc. 33, 34.

(*i*) Hawk. P. C. b. 1, c. 36.

(*k*) Barrington on Statutes, 375,

(*l*) The previous provisions on this head, contained in 7 & 8 Geo. 4, c. 29, s. 12, and 7 Will. 4 & 1 Vict. c. 86, s. 5, are repealed by 24 & 25 Vict. c. 95.

*
less than three years; or to be imprisoned, with or without hard labour and solitary confinement, not exceeding two years; and by the second, the same punishment is awarded to whomsoever shall steal in a dwelling-house any chattel, money or valuable security, and shall by any menace or threat *put any one, being therein, in bodily fear*.

2. Larcenies *in ships, wharfs, &c.* Whosoever shall steal any goods or merchandize in any vessel, barge or boat in any haven or port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river, or canal;—or who shall steal any goods or merchandize from any dock, wharf, or quay adjacent to any such haven, port, river, canal, creek, or basin;—is liable to the same punishments as last mentioned (n). And the same punishments may be awarded to whomsoever shall plunder or steal any part of any ship or vessel in distress, or wrecked, or stranded, or cast on shore, or any goods, merchandize, or articles of any kind to her belonging (o).

3. [Larceny *from the person* (p): which is either by *privately stealing*; or by open and violent assault, usually called *robbery*. The offence of *privately stealing from a man's person*,—as by picking his pocket or the like, privily without his knowledge,—was debarred of the benefit of clergy so early as by the statute 8 Eliz. c. 4 (q):] a severity which [seems to be owing to the case with which such

(n) 24 & 25 Vict. c. 96, s. 63.

(o) Sect. 64.

(p) In certain cases, larceny from the person may be disposed of summarily by justices at petty sessions, (or before a metropolitan or stipendiary magistrate.) Vide post, chapter on Summary Convictions.

(q) This, however, was only where

the thing stolen was of the value of more than twelve pence; for if it was below that value, so as to reduce the offence to petit larceny (as to which vide sup. p. 203), there was no need of the benefit of clergy,—the sentence not being capital. Hawk. P. C. b. 1, c. 35, s. 4.

[offences are committed, the difficulty of guarding against them, and the boldness with which they were practised (even in the Queen's court and presence) at the time when this statute was made: besides, that this was an infringement of property in the manual occupation or corporal possession of the owner; which was an offence even in a state of nature: and, therefore, the *saccularii*, or cut purses, were more severely punished than common thieves by the Roman and Athenian laws(*r*).] But this statute of Elizabeth, is now repealed by 7 & 8 Geo. IV. c. 27; and new provisions are now in force as to the punishment of this offence, of which we shall presently have occasion to speak more at large.

[Open and violent larceny from the person, or robbery, the *rapine* of the civilians, is the] unlawful and [forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear(*s*). 1. There must be] an unlawful [taking, otherwise it is no robbery(*t*).] On the other hand, [if the thief, having once taken a purse, returns it, still it is a robbery(*u*); and so it is, whether the taking be strictly from the person of another, or in his presence only; as where a robber, by menaces and violence, puts a man in fear, and drives away his sheep or his cattle before his face(*x*). But if the taking be not either directly from his person or in his presence, it is no robbery(*y*). 2. It is immaterial of what value the thing is: a penny as well as a pound, thus for-

(*r*) Ff. 47, 11, 7; Pott. Antiq. 1. 1, c. 26.

(*s*) Hawk. P. C. b. 1 c. 34, s. 2.

(*t*) A mere attempt to rob was held to be felony, so late as Henry the fourth's time; (1 Hale, P. C. 532;) but afterwards it was taken to be only a misdemeanor, until 7 Geo. 2, c. 21; which made it a felony. This statute was repealed by 4 Geo. 4, c. 54, itself repealed by

7 & 8 Geo. 4, c. 27. As to the present law with regard to assaults with intent to rob, under 24 & 25 Vict. c. 96, s. 40, et seq., vide post, p. 211.

(*u*) R. v. Peat, 1 Leach, C. C. 228.

(*x*) 1 Hale, P. C. 533.

(*y*) Comyns, 478; R. v. Francis, Str. 1015.

[cibly extorted, makes a robbery (*z*). 3. Lastly, the taking must be by force, or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. For, according to the maxim of the civil law, *qui vi rapuit, fur improbius esse videtur* (*a*). This previous violence or putting in fear, is the criterion that distinguishes robbery from other larcenies. For if one privately steals] a chattel [from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent (*b*). Not that it is indeed necessary to lay in the indictment, that the robbery was committed by *putting in fear*; it is sufficient if laid to be done by *violence* (*c*). And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that so much force or threatening, by word or gesture, be used as might create an apprehension of danger; or induce a man to part with his property without or against his consent (*d*). Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*, yet this is undoubtedly a robbery.] Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence; this also falls within the definition of the same crime (*e*). [So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubtful whether the forcing a higgler or other chapman to sell his wares, and giving him the full value for them, amounts to so heinous a crime as robbery (*f*). This species of larceny was debarred of the benefit of clergy by stat. 23 Hen. VIII. c. 1, and other subsequent statutes; not indeed in general, but only when committed in a

(*z*) Hawk. P. C. b. 1, c. 34, s. 16. the judges.

(*a*) Ff. 47, 2, 4, xxii.

(*d*) Fost. 128.

(*b*) 1 Hale, P. C. 534.

(*e*) Hawk. P. C. b. 1, c. 34, s. 8.

(*c*) Trin. T. 3 Ann. so held by all

(*f*) Ibid. s. 14.

[dwelling-house, or in or near the king's highway. A robbery, therefore, in a distant field, was not punished with death (*g*); but was open to the benefit of clergy till the statute 3 & 4 W. & M. c. 9; which took away clergy from both principals and accessories before the fact in robbery, wheresoever committed.]

But all these statutes,—as well as the 8 Eliz. c. 4, with respect to privately stealing from the person,—were repealed by 7 & 8 Geo. IV. c. 27. And, by other enactments, new provisions are now made against both species of offences; with distinctions, as regards robbery, suitable to the aggravations with which that crime may have been committed. According to these, whosoever shall rob any person, or shall steal any chattel, money or valuable security from the person of another, shall be guilty of felony, and may be sentenced to penal servitude for fourteen years or not less than three years, or to imprisonment, with or without hard labour and solitary confinement, not exceeding two years (*h*). And if the robbery be not effected or proved, but the offender be convicted (as he may be on an indictment for robbery) of an *assault with intent to rob*, then such assault is also felony, and imprisonment to the same extent may be awarded; but, if the punishment be by way of penal servitude, the term in that case is limited to *three years* (*i*). In certain instances, however, either robbery or an assault with that intent, is more severely punishable; for whosoever shall, being armed with any offensive weapon or instrument, rob or assault with intent to rob any person; or shall, together with one or more other person or persons, rob or so assault any person; or shall rob any person, and at the time of or immediately before or after wound, beat, strike, or use any other personal violence to any person,—may be sentenced to

(*g*) 1 Hale, P. C. 535.

(*h*) 24 & 25 Vict. c. 96, s. 40.

This and the following provisions are in substitution for others con-

tained in 7 Will. 4 & 1 Vict. c. 87, and 14 & 15 Vict. c. 100, which are repealed by 24 & 25 Vict. c. 95.

(*i*) 24 & 25 Vict. c. 96, ss. 41, 42.

penal servitude *for life*, if that punishment be adopted ; but he may here, also, at the discretion of the court, be punished by imprisonment merely, to the extent and in the manner already particularized (*j*).

In connexion with robbery may be here mentioned, the provisions which have been framed to meet the crime of extorting money and other valuables, by *threats* of various kinds. And, first, the same punishment as last mentioned (with the addition of whipping, if the court see fit, and the offender be a male under sixteen,) is awarded to the felonious crime of sending, delivering or uttering, or directly or indirectly causing to be received, knowing its contents, any letter or writing demanding of any person, with menaces and without any reasonable or probable cause, any property, chattel, money, valuable security or other valuable thing (*h*). And penal servitude to the extent of three years, or imprisonment as before, but not whipping, is awarded to the felonious crime of demanding with menaces or by force any property, chattel, money, valuable security or valuable thing of any person with intent to steal the same (*l*).

Moreover penal servitude for life or three years, or imprisonment—with or without hard labour, solitary confinement and whipping, if a male under sixteen,—is awarded to whomsoever shall commit the felonious crime of sending, delivering or uttering, or directly or indirectly causing to be received, knowing the contents, any letter or writing, accusing or threatening to accuse (*m*) any other person of any crime punishable by law with death or penal

(*j*) 24 & 25 Vict. c. 96, s. 43. The provision previously in force (7 Will. 4 & 1 Vict. c. 87, ss. 2, 3, now repealed by 24 & 25 Vict. c. 95), made robbery accompanied with wounding, &c., a *capital* felony.

(*h*) 24 & 25 Vict. c. 46, s. 44. This and the following provision are in substitution of 7 & 8 Geo. 4, c. 29,

s. 8, and 7 Will. 4 & 1 Vict. c. 87, ss. 7, 12, repealed by 24 & 25 Vict. c. 95.

(*l*) 24 & 25 Vict. c. 96, s. 45.

(*m*) See also 6 & 7 Vict. c. 96, s. 3, as to the offence of threatening to publish or offering to abstain from publishing a *libel* with intent to extort money, &c.

servitude for not less than seven years,—or of an assault, or attempt or endeavour to commit any rape or infamous crime, with a view or intent thereby to extort or gain any such property or thing from any person (*n*);—and to whomsoever shall accuse or threaten to accuse either the person to whom such accusation or threat shall be made, or any other person, of any of the above crimes, with the view or intent of such extortion or gain, either from the person accused or threatened, or from any other person (*o*);—or who, with intent to defraud or injure any other person, shall, by any unlawful violence, restraint or threat to the person of another, or by accusing or threatening to accuse him of any treason, felony or infamous crime, compel or induce any person to execute, make, accept, indorse, alter or destroy any valuable security, or to affix his name or the name of any other person or company, firm or co-partnership, or the seal of any corporation or society, to any paper or parchment, in order that the same may be converted into a valuable security. The addition of *whipping* to the rest of the sentence has not however been authorized with regard to this last-mentioned felony (*p*).

4. Larceny or embezzlement *by clerks, servants, &c.* (*q*). Special provision against larcenies by servants was made by the statutes 33 Hen. VI. c. 1, and 21 Hen. VIII. c. 7; but both of these were repealed by 7 & 8 Geo. IV. c. 27. By the enactments now in force on the subject, it is provided, that whosoever, being a clerk or servant, or person employed for the purpose, or in the capacity of a clerk or servant, shall steal any chattel, money, or valuable security, belonging to or in the possession or power of his

(*n*) 24 & 25 Vict. c. 96, s. 46. This section (which is in substitution for the repealed 7 & 8 Geo. 4, c. 29, s. 8) defines “the infamous crimes” to which it refers. See also as to the menaces or threats used, 24 & 25 Vict. c. 96, s. 49.

(*o*) 24 & 25 Vict. c. 96, s. 47, framed on 10 & 11 Vict. c. 66, s.

2, repealed by 24 & 25 Vict. c. 95.

(*p*) 24 & 25 Vict. c. 96, s. 48.

(*q*) In certain cases, larceny by clerks and servants may be disposed of summarily by justices at petty sessions, or before a metropolitan or stipendiary magistrate. (Vide post, Chapter on Summary Convictions.)

master, shall be guilty of felony and liable to penal servitude for a term not exceeding fourteen years, nor less than three years; or may be imprisoned (with or without hard labour or solitary confinement) for a term not exceeding two years; and if a male, under the age of sixteen, be whipped, if the court think fit, in addition to the imprisonment (*p*). And if larceny be committed by one employed in the public service of her Majesty, or by a constable or other person employed in the police, of any chattel, money, or valuable security, belonging to or in the possession or power of her Majesty, or intrusted to or received by the thief in virtue of his employment,—the same punishments as last mentioned (with the exception of whipping) may be awarded (*q*). In addition to which, there are separate provisions against *embezzlement*; a crime distinguished from larceny (properly so called), as being committed in respect of property which is not, at the time, in the actual or legal possession of the owner (*r*). As to this it is enacted, that whosoever, being a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received, or taken into possession by him, for or in the name or on the account of his master, or any part thereof, shall be deemed to have feloniously stolen the same and punished accordingly (*s*): and that the same penalties shall attach, if the offender be one employed in the service of her Majesty or in the police, and entrusted by virtue thereof with the receipt, custody, management, or control of what has been embezzled (*t*). And where the act of embezzlement has been committed by any officer or servant of the Bank of England or

(*p*) 24 & 25 Vict. c. 96, s. 67. This is in the place of 7 & 8 Geo. 4, c. 29, s. 46, repealed by 24 & 25 Vict. c. 95.

(*q*) 24 & 25 Vict. c. 96, s. 69. See Reg. v. Moah, 25 L. J., M. C. 66.

(*r*) See R. v. Gill, 1 Dearsley's C. C. R. 289. As to the indictment

for embezzlement, see 24 & 25 Vict. c. 96, s. 71.

(*s*) 24 & 25 Vict. c. 96, s. 68. The punishment is particularized sup. p. 213. A verdict for embezzlement may be had on an indictment, charging larceny, and *vice versa*. (24 & 25 Vict. c. 96, s. 72.)

(*t*) Sect. 70.

Ireland, in respect of any security, money or effects lodged at the Bank, or with him as its officer or servant, the term of penal servitude may be for *life* (*u*). With respect to fraudulent appropriation by *agents* and others, not amounting in legal contemplation to larceny or felonious embezzlement, but still proper to be repressed by highly penal enactments, other provisions are made. Thus it is enacted, that if any person, having been entrusted, (either solely, or jointly with any other person,) as a *banker, merchant, broker, attorney*, or other *agent*, with any money or security, with any direction in writing to apply the same, or the proceeds of such security, as specified in such direction—shall, in violation of good faith and contrary to such direction, in any wise convert the same to the use or benefit of any person other than the person by whom he was entrusted, he shall be guilty of a *misdemeanor*; and may be sentenced to penal servitude for a term not exceeding seven years, or less than three years, or to imprisonment not exceeding two years with or without hard labour and solitary confinement (*x*). Again, if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any stock or fund,—shall be entrusted to any banker, merchant, broker, attorney or other agent, either for safe custody or for any special purpose;—and he shall, in violation of good faith, and contrary to such purpose, sell, negotiate, transfer, pledge, or in any manner convert the same to the use or benefit of any person other than him by whom he was entrusted;—every such offender shall incur the same penalties, as are imposed in the case last before mentioned (*y*). It is provided, however, that these enactments relative to *agents* shall not affect any *trustee* or *mortgagee* in respect of any act done by him in relation to the property comprised in the trust or mortgage: nor shall it restrain any banker, merchant, broker, attorney or other agent, from receiving money due upon any valuable

(*u*) 24 & 25 Vict. c. 96, s. 73.

(*y*) *Ibid.*

(*x*) Sect. 75.

security, in such manner as he might otherwise have lawfully done : nor from disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand, entitling him by law to dispose thereof,—unless such disposal shall extend to more than shall be requisite for satisfying such lien, claim or demand (z). It is also enacted, that whosoever, being a banker, merchant, broker, attorney, or agent, and being entrusted either solely or jointly with any other person, with the property (a) of any other person for safe custody ;—or with any power of attorney for the sale or transfer of any property,—shall fraudulently in any manner convert or appropriate the same to the use or benefit of any person other than the person by whom he was entrusted, shall be guilty of a misdemeanor ; and be punishable in the manner and to the extent as in the misdemeanor last before mentioned (b). And that whosoever being a *factor* or agent entrusted for any purpose with the possession of any goods, or of any documents of title to goods, shall without the authority of his principal, for the use or benefit of any person other than such principal, and in violation of good faith, make any consignment, deposit, transfer or delivery of any such goods or documents so entrusted, by way of a pledge or security for any money or valuable security borrowed by such factor or agent,—or shall accept advances on the faith of an agreement to pledge such goods or documents,—he shall incur the same penalties as in the two former cases (c). But no factor or agent shall be liable to pro-

(z) 24 & 25 Vict. c. 96, s. 75. This section is framed on 7 & 8 Geo. 4, c. 29, ss. 49, 50, repealed by 24 & 25 Vict. c. 95.

(a) The term “ property ” in the interpretation of 24 & 25 Vict. c. 96, includes every description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or

giving a right to recover or receive any money or goods. (24 & 25 Vict. c. 96, s. 1.)

(b) Sects. 76, 77. Provisions to the same effect were contained in the Fraudulent Trustees Act (20 & 21 Vict. c. 54), now repealed by 24 & 25 Vict. c. 95.

(c) Sect. 78. This is framed on the 5 & 6 Vict. c. 39, s. 6, now repealed by 24 & 25 Vict. c. 95.

secution for consigning, depositing, transferring or delivering such goods or documents, in case the same shall not be made a security for more than the amount then justly owing to such agent from his principal, together with the amount of any bill drawn by or on account of such principal and accepted by such factor or agent (*d*).

In addition to all of which provisions, it is also enacted that any person offending in any of the cases following (*e*), shall be guilty of a misdemeanor, and punishable as for the misdemeanors already mentioned:—1. Any person, who, being a *trustee* of any property for some other person, or public or charitable purpose, shall, (with intent to defraud,) convert, or appropriate the same, to the use or benefit of any person other than such other person, or for any other purpose, or otherwise dispose of such property (*f*). 2. Any person, who, being a director, member, or public officer of any body corporate or public company, shall fraudulently so take or apply any of the property of such body corporate or public company (*g*). 3. Any person, who, being a director, public officer, or manager of such body or company, shall, as such, receive or possess himself of any of

(*d*) 24 & 25 Vict. c. 96, s. 78.

(*e*) The provisions here following are framed on the 20 & 21 Vict. c. 54, repealed by 24 & 25 Vict. c. 95.

(*f*) 24 & 25 Vict. c. 96, s. 80. A "trustee" is, for the purposes of this Act, a trustee on some express trust created by some deed, will, or instrument in writing; and the term includes the heir or personal representative of such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, official manager, assignee, liquidator, or other like officer acting under any Act relating to joint stock companies, bankruptcy or insolvency. (24 & 25 Vict. c. 96,

s. 1.) It is to be noticed that a prosecution for the first misdemeanor above mentioned, against a *trustee*, can only be undertaken by the sanction of the attorney-general, or (in case that office be vacant) of the solicitor-general; and that "where any civil proceeding shall have been taken against any person to whom its provisions apply, no person who shall have taken such civil proceeding shall commence any prosecution under it without the sanction of the court or judge before whom such civil proceeding shall have been heard, or is pending." (24 & 25 Vict. c. 96, s. 80.)

(*g*) 24 & 25 Vict. c. 96, s. 81.

the property of such body or company, otherwise than in payment of a just debt or demand; and shall with intent to defraud, omit to make, or to cause or direct to be made, a full and true entry thereof in the books and accounts (*h*): or shall make, circulate or publish, or concur in making, circulating or publishing, any written statement or account, which he shall know to be false in any material particular; with intent to deceive or defraud any member, shareholder or creditor of such body or company; or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any money or property to such body or company, or to enter into any security for the benefit thereof (*i*). And 4. Any person, who, being a director, manager, public officer, or member of any such body or company, shall, with intent to defraud, destroy, alter, mutilate or falsify any book, paper, writing, or valuable security, belonging to the body or company; or make or concur in the making of any false entry, or material omission, in any book of account or other document (*j*). There is, moreover, a provision that no proceeding, conviction or judgment for any of the above misdemeanors shall prevent, lessen or impeach any remedy, at law or in equity, which any person aggrieved by any of them might otherwise have had (*k*); or affect or prejudice any agreement or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated (*l*).

5. *Larcenies in relation to the Post office.* By 7 Will. 1 V. & 1 Vict. c. 36, s. 25, every person employed under the Post office, who shall, contrary to his duty, open or procure or suffer to be opened, or wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter, shall be guilty of a misdemeanor; and punished by fine or im-

(*h*) 24 & 25 Vict. c. 96, s. 82.

(*i*) Sect. 84.

(*j*) Sect. 83.

(*k*) Sect. 86. But no conviction

shall be received in evidence against the offender, at law or in equity.

(*lbid.*)

(*l*) 24 & 25 Vict. c. 96, s. 85.

prisonment, or both, as to the court shall seem meet. By other provisions, every person so employed, who shall steal, or for any purpose embezzle, secrete or destroy a post letter, shall be guilty of felony, and he is punishable with penal servitude for not more than seven or less than three years, or with imprisonment (with or without hard labour and solitary confinement) for not more than two years(*m*): and if the letter contain any chattel, money, or valuable security, then the term of penal servitude may be *for life*(*n*). Again, every person so employed, who shall steal, or, for any purpose, embezzle, secrete or destroy, or wilfully detain or delay in the course of conveyance or delivery by post, any printed votes, or proceedings in parliament, or any printed newspaper, or other printed paper sent by the post without covers, or in covers open at the sides,—shall be guilty of a misdemeanor punishable by fine or imprisonment, or both, as to the court shall seem meet(*o*). These provisions relate only to offences by persons employed in the department of the Post office: but by other enactments, *every* person who shall steal out of a post letter any chattel or money or valuable security; or shall steal a post letter-bag; or a post letter from a post letter-bag, or from a post office or officer of the post, or a mail; or shall stop a mail with intent to rob or search the same; shall be guilty of felony; and he may be sentenced to the same punishments as last before specified(*p*). And every receiver of a post letter, post letter-bag, chattel, money or valuable security feloniously stolen

(*m*) 7 Will. 4 & 1 Vict. c. 36, s. 26; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*n*) 7 Will. 4 & 1 Vict. c. 36, ss. 25, 41, 42; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to this provision, see *R. v. Rathbone*, 1 Car. & M. 220; *R. v. Mence*, ib. 234; *R. v. Young*, 2 Car. & K. 466; *R. v. Glassey*, 2 Cox's Cr. C. 236; *R. v. Reason*, 1

Dearsley's C. C. R. 226; *R. v. Shepherd*, ibid. 606.

(*o*) 7 Will. 4 & 1 Vict. c. 26.

(*p*) 7 Will. 4 & 1 Vict. c. 36, ss. 27, 28, 41, 42; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to this offence, see *R. v. Harley*, 1 Car. & Kir. 89. Stealing letters sent by the post was felony without benefit of clergy, by 7 Geo. 3, c. 50, repealed by 7 Will. 4 & 1 Vict. c. 32.

under the Post office Acts, knowing the same to have been so stolen, shall be guilty of felony; and he may be sentenced in the same way (*q*). And every person who shall steal or unlawfully take away a post letter-bag sent by a Post office packet, or a letter out of any such bag; or shall unlawfully open any such bag;—shall be guilty of felony: and he may be sentenced to the same punishments, except that, if by way of penal servitude, the term must not exceed fourteen years (*r*). And every person who shall fraudulently retain, or wilfully secrete, or keep, or detain, or, being required by an officer of the Post office, neglect or refuse to deliver up a post letter, which ought to have been delivered to any other person; or shall neglect or refuse to deliver up a post letter-bag, or post letter which shall have been sent and lost;—shall be guilty of a misdemeanor, and be punishable with fine and imprisonment (*s*).

Having now considered the several kinds of larcenies, whether simple or with aggravation, we must refer, under the same head, to that offence so closely connected with larceny itself, of *receiving stolen property knowing the same to have been stolen* (*t*). This offence was, at common law, a misdemeanor only (*u*); but was afterwards made felony by

(*q*) 7 Will. 4 & 1 Vict. c. 36, ss. 30, 41, 42; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*r*) 7 Will. 4 & 1 Vict. c. 36, ss. 29, 41, 42; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. See *R. v. Jones*, 2 Car. & K. 236.

(*s*) 7 Will. 4 & 1 Vict. c. 36, s. 31. By 11 & 12 Vict. c. 88, s. 4, every officer of the Post office who shall grant or issue any *money order* with a fraudulent intent, shall be guilty of felony: he is liable, at the discretion of the court, to penal servitude for not more than seven or less than three years, or imprison-

ment for any term not exceeding three years. (11 & 12 Vict. c. 88, s. 4; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.) See also 11 & 12 Vict. c. 88, s. 5, providing that in all indictments for offences against the Post office it shall be sufficient to allege an intent to defraud "Her Majesty's Postmaster-General," &c.

(*t*) As to the *indictment* for this offence, see 24 & 25 Vict. c. 96, s. 92, making it lawful in an indictment for *stealing*, to add a count for receiving the same property, knowing it to have been stolen.

(*u*) In the time of Blackstone receivers of stolen property might be indicted as accessories after the fact

several statutes now repealed (*x*). It is, however, now provided by 24 & 25 Vict. c. 96, s. 91, that whosoever shall receive any chattel, money, or valuable security, or other property whatever (knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of), the stealing, taking, extorting, obtaining, embezzling or otherwise disposing whereof shall amount to *felony*, either by common law or by virtue of that Act, shall be guilty of felony (*y*); and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and, however convicted, such receiver is liable at the discretion of the court to penal servitude for a term not exceeding fourteen years nor less than three years, or to imprisonment, (with or without hard labour and solitary confinement,) for a term not exceeding two years; and, if a male under the age of sixteen, he may also be whipped, if the court think fit, in addition to any imprisonment awarded (*z*). If, however, the thing received was such that its stealing, taking, obtaining, converting or disposal is made a *misdemeanor* by that Act, then its reception is a misdemeanor and punishable with penal servitude to the extent of seven years, or by imprisonment as in the case of the felonious offence (*a*). And where the stealing or taking of any property whatever is punishable by the same Act, by way of summary conviction, either for every offence, or for the first and second offences only, or for the first offence only,—the

and transported for fourteen years. He remarks (vol. 1st p. 38), that in France such receivers were punished with death; and that, according to the Gothic constitution, there were three sorts of thieves, "*unum qui consilium daret, alterum qui contractaret, tertium qui receptaret et occuleret; pari pœnæ singulos obnoxios.*"—And he cites Stiern. de

Jure Goth. l. 3, c. 5.

(*x*) By 7 & 8 Geo. 4, c. 27.

(*y*) It is immaterial that the intention with which he receives them, is for concealment and not for profit. (*R. v. Richardson*, 6 Car. & P. 335; *R. v. Davis*, *ibid.* 177.)

(*z*) 24 & 25 Vict. c. 96, s. 91.

(*a*) *Ibid.* s. 95.

guilty receiver may also be summarily convicted, and is liable for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property, is by the Act made liable (*b*).

II. *Malicious mischief* is the next species [of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss; which is some, though a weak excuse; but either out of a spirit of wanton cruelty, or of black and diabolical revenge; in which it bears a near relation to the crime of arson: for as that affects the habitation, so this does the other property of individuals. And therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now,] by a multitude of enactments (recently consolidated into a single statute) made highly penal.

The Act here referred to is in substitution of a prior Act passed with a similar object (the 7 & 8 Geo. IV. c. 30); and is the 24 & 25 Vict. c. 97, entitled "An Act to consolidate and amend the statute law relating to malicious injuries to property" (*c*). And as to such injuries we may premise in general, that though malice is the usual motive for this class of crimes, yet the statute contains an express enactment that its provisions shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise (*d*).

(*b*) 24 & 25 Vict. c. 96, s. 98. As to guilty receivers in the case of anchors, &c., see 1 & 2 Geo. 4, c. 76, s. 10; 9 & 10 Vict. c. 99, s. 29. In order, as far as possible, to prevent this crime in reference to articles affording peculiar temptations, dealers in *old metals* are placed under regu-

lations by 24 & 25 Vict. c. 110, and in *marine stores* by 17 & 18 Vict. c. 104, s. 480.

(*c*) The numerous statutes cited by Blackstone in reference to malicious injuries to property, are all repealed by 7 & 8 Geo. 4, c. 27.

(*d*) 24 & 25 Vict. c. 97, s. 58.

Some of the provisions of this Act are noticed in other parts of the work, and they are too numerous for complete enumeration. It may be mentioned, however, that it makes provision against malicious injuries to silk, woollen, linen, cotton, hair, mohair, or alpaca goods *in the process of manufacture*, or to the machines employed therein (*e*); to machines used in other manufactures (*f*); to hopbinds (*g*); to dwelling-houses and other buildings (*h*); to trees and shrubs adjoining dwelling-houses (*i*); or elsewhere (*j*); to garden produce (*k*); to vegetable productions growing elsewhere (*l*); to fences (*m*); to mines (*n*), and mining engines (*o*); to sea banks and walls (*p*); to navigable rivers and canals (*q*); to ponds (*r*); to bridges and viaducts (*s*); to turnpike gates (*t*); to railway and railway carriages or engines (*u*); to electric or magnetic telegraphs (*v*); to

(*e*) 24 & 25 Vict. c. 97, s. 14. Felony, extreme of penal servitude, *life*. Where the prisoner is convicted on indictment for either a *felony* or a *misdemeanor* under this Act, and the punishment inflicted is by way of *imprisonment*, it may be to the extent of two years, with or without hard labour and solitary confinement, and, if a male under sixteen, whipping.

(*f*) Sect. 15, felony, *seven years*.

(*g*) Sect. 19, felony, *fourteen years*.

(*h*) Sects. 9, 10. If by explosion of gunpowder or other explosive substance in a dwelling-house, and the life of any person be endangered, felony, *life*; if by placing such explosive substance in any building, with intent to destroy it, felony, *fourteen years*. By sect. 13, any tenant of a building unlawfully and maliciously pulling it or any part of it down in severing fixtures, is guilty of a *misdemeanor*.

(*i*) Sect. 20, (if injury done exceed 1*l.*) felony, *three years*.

(*j*) Sect. 21, (if injury done ex-

ceed 5*l.*) felony, *three years*. [If, however, the injury to the tree, &c., *wherever* growing, do not amount to 1*s.*, then a first offence is only punishable by way of summary conviction.—Sect. 22.]

(*k*) Sect. 23, first offence, *summary conviction*; second offence, felony, extreme of penal servitude, *three years*.

(*l*) Sect. 24, *summary conviction*.

(*m*) Sect. 25, *summary conviction*.

(*n*) Sect. 28, felony, *seven years*.

(*o*) Sect. 29, felony, *seven years*.

(*p*) Sect. 30, felony, *life*.

(*q*) Sect. 31, felony, *seven years*.

(*r*) Sect. 32, felony, *seven years*.

(*s*) Sect. 33, felony, *life*.

(*t*) Sect. 34, *misdemeanor, fine and imprisonment as at common law*.

(*u*) Sect. 35, felony, *life*. And see sect. 36, as to *misdemeanor*, by obstructing engines, &c., by any unlawful act, or wilful omission or neglect.

(*v*) Sects. 37, 38, *misdemeanor, imprisonment*. •

works of art in public places (*x*); to cattle (*y*); to other animals (*z*); to ships and vessels (*a*); to buoys and sea-marks (*b*); and to wrecks (*c*). And all of these injuries are made,—according to their several degrees of mischief or malignity,—either felonies or misdemeanors, or else offences such as may be disposed of, by way of summary conviction, before a justice of the peace (*d*). The Act also contains a general provision, that whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which it provides no other punishment, shall be guilty of a misdemeanor, (provided the injury shall exceed the value of 5*l.*,) and be liable to imprisonment (with or without hard labour) to the extent of two years; and if the offence be committed *by night*, may be sentenced either to such imprisonment or to penal servitude to the extent of five years (*e*). And another, that such offenders as last mentioned, in cases where the damage does *not* exceed the value of 5*l.*, may be summarily convicted before a justice of the peace, and may either be committed to prison (with or without hard labour) to the extent of two months, or else shall forfeit such sum of money (not exceeding five pounds) as shall appear to the said justice a reasonable compensation for the damage committed: which sum, in the case of private property, shall be paid to the party aggrieved; but, when property of a public nature or a public right is concerned, shall be paid over to the treasurer of the county, borough or place for which the convicting justice acts (*f*). There is, however, a proviso that nothing in either of these provisions shall extend to any case where a party trespassing, acted under a fair

(*x*) 24 & 25 Vict. c. 97, s. 39,
misdemeanor, *imprisonment*.

(*y*) Sect. 40, felony, *fourteen years*.

(*z*) Sect. 41, *summary conviction*.

(*a*) Sects. 42—47, felony, *life, fourteen or seven years*, according to the nature of the injury.

(*b*) Sect. 48, felony, *seven years*.

(*c*) Sect. 49, felony, *fourteen years*.

(*d*) Vide post, chapter on Summary Convictions.

(*e*) Sect. 51.

(*f*) See 11 & 12 Vict. c. 43, s. 31.

and reasonable supposition that he had a right to do the act complained of; nor to any trespass, (not being wilful or malicious,) committed in hunting, fishing, or the pursuit of game (*g*).

III. [*Forgery* (or the *crimen falsi*) is an offence which was punished by the civil law with deportation or banishment, and sometimes with death (*h*). It may with us be defined, *at common law*, to be the fraudulent making or alteration of a writing,] or seal, [to the prejudice of another man's right;] or of a stamp, to the prejudice of the revenue (*i*). In reference to this crime, as regards writings, it has been decided, that the instrument forged must so far resemble the true instrument as to be capable of deceiving persons who use ordinary observation (*j*): that any material alteration, (however slight,) is a forgery, as well as an entire fabrication (*k*): that the fraudulent application of a false signature to a true instrument, or a real signature to a false one, are consequently both forgeries (*l*): and that even if the name forged be merely a fictitious one, it is as much forgery, if done for the purpose of fraud, as if the name were that of a real person (*m*). It may also be remarked, that by 9 Geo. IV. c. 32, it was provided—even before the change of law, by which interested parties were made competent witnesses in criminal as well as civil inquiries (*n*),—that the party whose name is forged might be called as a witness to prove that the writing is not his. But on the other hand, it is an established rule, that the proof of forgery by a mere comparison of handwriting is not admissible (*o*). At common

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|---|---|
| (<i>g</i>) 24 & 25 Vict. c. 97, s. 52. | P. C. ubi sup. |
| See also sect. 53. | (<i>m</i>) R. v. Bontien, R. & R. C. C. |
| (<i>h</i>) 4 Inst. 18, 7. | R. 260. |
| (<i>i</i>) 2 East, P. C., c. xix. s. 60. | (<i>n</i>) This was by 6 & 7 Vict. c. 85. |
| (<i>j</i>) R. v. Collicott, R. & R. C. C. | Vide sup. vol. III. p. 634. |
| R. 212; S. C. 229. | (<i>o</i>) Doe v. Suckermore, 5 A. & E. |
| (<i>k</i>) 2 East, P. C. c. xix. s. 4. | 703. See Taylor on Evidence, p. |
| (<i>l</i>) 3 Chit. Crim. Law, 1038, cites | 1428, n. (5), 2nd edit. |
| 1 Hale, P. C. 683; et vide 2 East, | |

law, this offence was a misdemeanor only; but when, in the progress of society, the perpetration of it became more easy, and its tendencies more dangerous, it became necessary to assign to it a more penal character, as regards those instruments which most required protection.

A recent statute (24 & 25 Vict. c. 98) has consolidated and amended "the statute law relating to indictable offences by Forgery (*p*);", and, among other enactments, it provides against the felonious offence of forging the Great Seal of the United Kingdom, the Privy Seal or any Privy Signet, the Sign-manual, the Seals of Scotland, or the Great Seal and Privy Seal of Ireland (*q*). It also makes it a felony to forge any stamp, exchequer bill, bank of England or other note, bill of exchange, promissory note, deed, receipt (*r*), order for the payment of money (*s*), transfer of stock or will,—or any records or proceedings of courts, court rolls, registers of deeds, registers of births, marriages and deaths, marriage licences,—and a variety of other documents, comprising all that are in the most ordinary use in the transactions of mankind. It attaches also the same felonious character, to the offence even of having in possession, without lawful excuse, (such excuse to be proved by the party accused,) any forged bank-note or the like, knowing it to be forged (*t*); or of having in pos-

(*p*) This Act is in substitution of a previous statute, which amended the laws relating to forgery in force at its date. This was the 11 Geo. 4 & 1 Will. 4, c. 66, which, so far as it relates to our present subject, is repealed by 24 & 25 Vict. c. 95. There are also a variety of earlier statutes, containing provisions against forgery in particular cases, and especially with regard to *records and process of courts*, the *public funds and stocks*, the *securities of public companies*, and *official documents*. As to these, (many of which appear to be practically superseded by the recent Act,) we must refer the

reader to the treatises on criminal law.

(*q*) 24 & 25 Vict. c. 98, s. 1. Antecedently to this Act, the offence of counterfeiting the Great Seal, &c. amounted to *treason*. This was formerly punishable with death; though (under 11 Geo. 4 & 1 Will. 4, c. 66) it was not a *capital* offence, but punishable with transportation for life.

(*r*) See *Clark v. Newsam*, 1 Exch. 131.

(*s*) See *Queen v. Dawson*, 20 L. J. (M. C.) 102.

(*t*) 24 & 25 Vict. c. 98, s. 13, *fourteen years*.

session, (without such excuse,) any frames, mould, plates, paper, &c., used in making bank-notes, or any paper with the name of any bank visible on the substance thereof(*u*).

The punishment of forging, uttering and the like at common law, and as a mere misdemeanor, was fine, imprisonment and pillory; but in the cases in which it was made by statute felonious, it was at one time deemed necessary also to inflict on the offender the extreme penalty of death. Capital punishment, however,—having been previously abolished, with regard to many cases of forgery, by 11 Geo. IV. & 1 Will. IV. c. 66, and 2 & 3 Will. IV. c. 123,—was altogether taken away, as a punishment for this offence, by 7 Will. IV. & 1 Vict. c. 84(*x*). And now (under the 24 & 25 Vict. c. 98, above referred to) the felon convicted of any of the forgeries provided against by that Act, is liable to penal servitude for life, fourteen, seven or three years (varying with regard to the different documents mentioned in the Act); or else (at the discretion of the court) to imprisonment for not more than two years, with or without hard labour and solitary confinement(*y*).

The same statute of 24 & 25 Vict. c. 98, contains enact-

(*u*) 24 & 25 Vict. c. 98, ss. 14, 18, *fourteen years*.

(*x*) It remained a capital offence, till the Act last mentioned, to forge a will or testamentary writing, a power of attorney, or other authority to transfer stock or receive dividends; and certain other instruments. (See 2 & 3 Will. 4, c. 123; 5 & 6 Will. 4, cc. 45, 61.)

(*y*) By the 24 & 25 Vict. c. 98, the different forgeries under that Act are made thus punishable:—(sect. 1) forging, &c., the Seals, (extreme of sentence by way of penal servitude), *life*; (sect. 2) stock transfers or powers of attorney, *life*;

(sect. 4) attestation of stock transfers or powers of attorney, *seven years*; (sect. 5) entries in the books of the Bank of England or Ireland, *life*; (sect. 7) India bonds, *life*; (sect. 8) exchequer bills, bonds, &c., *life*; (sect. 12) bank notes, *life*; (sect. 20) deeds *life*; (sect. 21) wills, *life*; (sect. 22) bills of exchange or promissory notes, *life*; (sect. 23) orders, receipts, &c. for money, *life*; (sect. 26) debentures, *fourteen years*; (sect. 27) records or proceedings of courts, *seven years*; (sect. 28) copies or certificates of records, &c., or process, *seven years*; (sect. 29) instruments made evidence by act of par-

ments against other practices connected with, or aiding the perpetration of, the crime of forgery; which in most cases are made felonies, and punishable with penal servitude or imprisonment. Of these our limits will not allow us to give a complete enumeration, but they comprise the following:—making paper, &c., in imitation of that used for exchequer bills or bonds (*a*);—purchasing forged notes, bank paper or bills (*b*);—making or engraving plates, moulds, &c., for bank notes (*c*);—accepting bills, notes, &c., without authority, with intent to defraud (*d*);—obliterating or altering marks on cheques or drafts, signifying they are to be paid through a banker (*e*);—falsely acknowledging recognizances or bail (*f*);—destroying or making false entries in registers (*g*);—and demanding (with intent to defraud) property on any forged instruments (*h*).

It has also recently been made (by 25 & 26 Vict. c. 88) a *misdemeanor*, fraudulently to forge or counterfeit any *trade mark* lawfully used by any other person to denote that any chattel or thing is of his own manufacture or merchandize, or in respect of which he has any copyright (*i*); and such offence (besides the forfeiture of the articles impressed with such forged or counterfeited marks) is made punishable by fine or imprisonment, or both. If imprisonment is awarded, it may be to the extent of two years, with or without hard labour (*k*). *

liament, *seven years*; (sect. 30) court rolls relating to copyholds, *life*; (sect. 31) registers of deeds, *fourteen years*; (sect. 32) orders of justices of the peace, *three years*; (sect. 33) certificates, &c. of accountant-general, &c. *fourteen years*; (sect. 35) marriage licences, *seven years*; (sects. 36, 37) registers of births, baptisms, marriages, deaths, or burials, *life*. In all of the above forgeries, however, punishment by way of imprisonment instead of penal servitude, may be awarded at the discretion of the court; and such im-

prisonment may be to the extent of two years, and with or without hard labour and solitary confinement.

(*a*) Sects. 9, 10, *seven years*.

(*b*) Sect. 13, *fourteen years*.

(*c*) Sects. 14—19, *fourteen years*.

(*d*) Sect. 24, *fourteen years*.

(*e*) Sect. 25, *life*.

(*f*) Sect. 34, *seven years*.

(*g*) Sects. 36, 37, *life*.

(*h*) Sect. 38, *fourteen years*.

(*i*) As to what is included under this term, for the purposes of the Act, see sect. 1.

(*k*) 25 & 26 Vict. c. 88, s. 14.

IV. *Obtaining property by false personation (l).* Frauds of this description were indictable, at common law, as misdemeanors, and punishable by fine and imprisonment(*m*), but are now also made penal by the express provision of acts of parliament. By these statutes, to personate any soldier, in order fraudulently to receive his pay, pension, prize money, or wages, is felony; and punishable with imprisonment to the extent of two years (with or without hard labour), or by penal servitude for life or not less than three years(*n*). Again to personate (with a like fraudulent intention), any seaman or marine(*o*); or falsely and deceitfully to personate any owner of any share or interest in stock of the Bank of England or Ireland, or of any corporation or society established by charter or act of parliament; or any owner of any dividend payable in respect thereof:—and thereby to endeavour to transfer the share or receive money due to the true owner, are, all of them, felonies, and make the offender liable to the punishments above specified(*p*).

V. *Obtaining property by false pretences.* This offence, which, like the last, is closely allied to larceny, though distinguishable from it as being perpetrated through the medium of a mere *fraud*,—was likewise a misdemeanor, at common law, punishable by fine and imprisonment; And now, by statute, whosoever shall, by any false pretence, obtain from any other person any chattel, money or valuable security(*q*), with intent to cheat or defraud any person of

(*l*) By 22 & 23 Vict. c. 17, no indictment for this offence shall be presented to or found by the grand jury, without security given for the due prosecution of the charge, unless the prosecution be directed by a judge, &c.

(*m*) 2 East, P. C. c. xx. s. 5.

(*n*) 7 Geo. 4, c. 16, s. 38; 2 Will. 4, c. 53, s. 49; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99;

20 & 21 Vict. c. 3. By 2 Will. 4, c. 33, s. 49, a provision similar to that mentioned in the text, contained in 5 Geo. 4, c. 107, is repealed.

(*o*) See 11 Geo. 4 & 1 Will. 4, c. 20, s. 84; 9 & 10 Vict. c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 8.

(*p*) 24 & 25 Vict. c. 98, s. 3.

(*q*) As to what is considered as

the same,—shall be guilty of a misdemeanor and be liable to penal servitude for three years; or he may be punished by imprisonment not exceeding two years, with or without hard labour and solitary confinement(*r*). There is also a provision, that if, upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to *larceny*, he shall not by reason thereof be entitled to be acquitted of such misdemeanor(*s*); and further, that the same penalties shall attach to whomsoever shall, with intent to defraud or injure any person by any false pretence, fraudulently cause or induce any other person to execute, make, accept, endorse or destroy the whole or any part of, any valuable security; or to write or affix his name, or that of any other person or persons, or the seal of any corporation or society, upon any paper or parchment, in order that the same may be made or converted into a valuable security(*t*).

VI. *Fraudulent concealment of deeds, or falsification of pedigree.* By 22 & 23 Vict. c. 35, s. 24 (amended by 23 & 24 Vict. c. 38, s. 8), any seller or mortgagor of land, or of any chattels real or personal, or choses in action conveyed or assigned to a purchaser or mortgagee—or any solicitor or agent of such seller or mortgagor,—who shall cancel any settlement, deed, will, or other instrument material to the title, or conceal any incumbrance from the

a false pretence, see the following cases:—*R. v. Crossley*, 2 M. & Rob. 17; *R. v. Ady*, 7 Car. & P. 140; *R. v. Asterley*, *ibid.* 191; *R. v. Williams*, *ibid.* 354; *R. v. Barnard*, *ibid.* 784; *R. v. Masterton*, 2 Cox's Cr. C. 100; *Reg. v. Sherwood*, 26 L. J., M. C. 81; the *Queen v. Goss*, 29 L. J., M. C. 86. As to the term *valuable security*, see *Reg. v. Greenhalgh*, 1 Dearsley's C. C. R. 267; *R. v. Danger*, 5 W. R. (C. C. R.)

738. The provision applies, though the money, &c. be delivered to some person other than, but for the benefit of, the person making the false pretence. (24 & 25 Vict. c. 96, s. 89.)

(*r*) 24 & 25 Vict. c. 96, s. 88.

(*s*) *Ibid.* See *The Queen v. Robinson*, 28 L. J., M. C. 58.

(*t*) 24 & 25 Vict. c. 96, s. 90. This provision is framed upon 21 & 22 Vict. c. 47, repealed by 24 & 25 Vict. c. 95.

purchaser or mortgagee, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor punishable with fine or with imprisonment not exceeding two years, (with or without hard labour,) or by both. But no prosecution shall be commenced without the sanction of the attorney-general, (or if that office be vacant, solicitor-general,) nor without previous notice to the person intended to be prosecuted.

CHAPTER VI.

OF OFFENCES AGAINST THE GOVERNMENT.

THE order of our distribution will next lead us to take into consideration, such crimes and misdemeanors as affect men not in their capacity of individuals, and in respect of their persons or property, but in their capacity of members of the commonwealth; and in respect of those rights which are common to all the subjects of the realm. These may be divided into seven species; viz., offences against the sovereign or civil government; against religion; against the law of nations; against public justice; against the public peace; against the public trade; and against the public health, police or economy. Under the first of these heads we shall advert, in the first place, to the crime of treason.

I. [Treason, *proditio*, in its very name, (which is borrowed from the French,) imports a betraying, treachery, or breach of faith (*a*);] and the crime of which we here speak, is treachery against the sovereign or liege lord (*b*): and as

(*a*) According to Lord Coke, "treason" comes from *trahir*. (3 Inst. 4.)

(*b*) "It therefore happens only between allies," (saith the Mirrour, c. 1, s. 7,) "for treason is indeed a general appellation made use of by the law to denote not only offences against the king and government: but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior between whom

"and himself there exists a natural, civil, or even a spiritual relation; and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord. This is looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbours it to have conspired in public against his liege

it is [the highest civil crime which, considered as a member of the community, any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of treason be indeterminate, this alone, (says the president Montesquieu,) is sufficient to make any government degenerate into arbitrary power (c). And yet, by the antient common law, there was a great latitude left in the breast of the judges to determine what was treason or not so, whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons: that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason which never were suspected to be such. Thus the *accroaching* or attempting to exercise royal power—a very uncertain charge—was, in the twenty-first year of Edward the third, held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90*l.*; a crime, it must be owned, well deserving of punishment, but which seems to be of a complexion very different from that of treason (d). Killing the king's father or brother, or even his messenger, has also fallen under the same denomination (e): the latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius; which determines that any attempts or designs against the ministers of the prince shall be treason (f). But, however,

“ lord and sovereign. And therefore
“ for a wife to kill her lord or husband, a servant his lord or master,
“ and an ecclesiastic his lord or
“ ordinary; these, being breaches of
“ the lower allegiance of private and
“ domestic faith, are denominated
“ *petit* treasons. But when disloyalty so rears its crest as to attack
“ even majesty itself, it is called, by
“ way of eminent distinction, *high*
“ treason, being equivalent to the
“ *crimen læsæ majestatis* of the Ro-

mans.” 4 Bl. Com. 75. Since the time of Blackstone, *petit* treason has been abolished (9 Geo. 4, c. 31, s. 2), and it has been thought therefore inexpedient to retain, in these Commentaries, the correlative term of *high* treason.

(c) Sp. L. b. xii. c. 7.

(d) 1 Hale, P. C. 80.

(e) Britt. c. 22; Hawk. P. C. b. 1, c. 17, s. 1.

(f) “*Qui de nece virorum illustrium, qui consiliis et consistorio nostro*

[to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2, was made, which defines what offences only, for the future, should be held to be treason; in like manner as the *lex Julia majestatis* among the Romans, promulged by Augustus Cæsar, comprehended all the antient laws that had before been enacted to punish transgressors against the State (*g*).] We shall find that, under this statute of Edw. III., the crime of treason consists of five distinct branches (*h*).

1. ["When a man doth compass or imagine the death " of our lord the king, of our lady his queen, or of their " eldest son and heir." Under this description it is held that a queen regnant (*i*),—such as Queen Elizabeth and Queen Anne,] and our present gracious sovereign Queen Victoria,—[is within the words of the Act, being invested with royal power, and entitled to the allegiance of her subjects (*k*); but the husband of such a queen is not comprised within these words, and therefore no treason can be committed against him (*l*). The king here intended is the king in possession, without any respect to his title; for it is held that a king *de facto*, and not *de jure*,—or in other words, an usurper that hath got possession of the throne,—

intersunt, senatorum etiam (nam et ipsi pars corporis nostri sunt) vel cujuslibet postremo, qui militat nobiscum, cogitaverit (eâdem enim severitate voluntatem sceleris, quâ effectum, puniri jura voluerint); ipse quidem, utpote majestatis reus, gladio feriatur, bonis ejus omnibus fisco nostro addictis."—Cod. 9, 8, 5.

(*g*) Gravin. Orig. 1, s. 34.

(*h*) Blackstone (vol. iv. p. 83) notices two additional species of treason under the statute of Edward the third, viz. 1, "counterfeiting the " king's great or privy seal;" and 2, "counterfeiting the king's money, " and bringing false money into the

" realm, counterfeit to the money of " England, knowing the same to be " false, to merchandize and make " payment withal." But as to the first of these, though the crime remained a treason under 11 Geo. 4 & 1 Will. 4, c. 66, it is now by 24 & 25 Vict. c. 98, reduced to an ordinary felony (vide sup. p. 226); and the second ranks now, merely as the offence of coining; as to which, vide post, c. vi.

(*i*) 1 Hale, P. C. 101.

(*k*) See R. v. Oxford, 9 Car. & P. 525.

(*l*) 3 Inst. 7; 1 Hale, P. C. 106.

[is a king within the meaning of the statute; as there is a temporary allegiance due to him for his administration of the government and temporary protection of the public. And therefore treasons committed against Henry the sixth were punished under Edward the fourth, though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, (or king *de jure*, and not *de facto*,) who hath never had plenary possession of the throne,—as was the case of the house of York, during the three reigns of the line of Lancaster,—is not a king, within this statute, against whom treasons may be committed (*m*). And a very sensible writer on the Crown law carries the point of possession so far, that he holds that a king out of possession, is so far from having any right to our allegiance by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him (*n*): a doctrine which he grounds upon the statute 11 Hen. VII. c. 1; which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, which do assist and obey a king *de facto*. But in truth this seems to be confounding all notions of right and wrong: and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power, though not the name of king, the people were bound in duty to hinder the son's restoration; and that were any foreign prince to invade this kingdom, and by any means to get possession of the Crown—a term, by the way, of very loose and indistinct signification—the subject would be bound by his allegiance to fight for his natural prince to day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry the seventh does by no means *command* any opposition to a king *de jure*, but *excuses* the obedience paid to a king *de facto*. When therefore an usurper is in possession, the subject is *excused* and *justi-*

(*m*) 3 Inst. 7; 1 Hale, P. C. 104. (*n*) Hawk. P. C. b. 1, c. 17, s. 16.

[*fied* in obeying and giving him assistance; otherwise, under an usurpation, no man could be safe, if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay, further, as the mass of people are imperfect judges of title, (of which, in all cases, possession is *primâ facie* evidence,) the law compels no man to yield obedience to that prince, whose right is, by want of possession, rendered uncertain and disputable, till Providence shall think fit to interpose in his favour, and decide the ambiguous claim; and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is, (according to Sir M. Hale,) no longer the object of treason (*o*). And the same reason holds in case the king abdicates the government, or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution; since, as was formerly observed, when the fact of abdication is once established and determined by the proper judges, the consequence necessarily follows that the throne is thereby vacant, and he is no longer king (*p*).

Let us next see what is a *compassing* or *imagining* the death of the king, &c. These are synonymous terms; the word *compass*, signifying the purpose or design of the mind or will (*q*); and not, as in common speech, the carrying such design into effect (*r*), and, therefore, an accidental stroke, which may mortally wound the sovereign *per infortunium*, without any traitorous intent, is no treason. As was the case of Sir Walter Tyrrel; who, by the command of King William Rufus, shooting at a hart, the arrow glanced against a tree and killed the king upon the

(*o*) 1 Hale, P. C. 104.

(*p*) Vide sup. vol. II. p. 455.

(*q*)*By the antient law the *compassing* or intending the death of

any man, if demonstrated by some evident fact, was equally penal as homicide itself. (3 Inst. 5.)

(*r*) 1 Hale, P. C. 107.

[spot (s). But as this compassing or imagining is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open or *overt* act. And yet the tyrant Dionysius is recorded to have executed a subject barely for dreaming that he had killed him; which was held for sufficient proof, that he had thought thereof in his waking hours (t).

But such is not the temper of the English law; and therefore it is necessary that there shall appear an open or overt act of a more full and explicit nature, to convict the traitor upon (u). The statute expressly requires that the accused “be thereof, upon sufficient proof, attainted of “some open act by men of his own condition.” Thus to provide weapons or ammunition for the purpose of killing the king, is held to be a palpable overt act of treason in imagining his death (x).

To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king’s death (y). For all force, used to the person of the king, in its consequence may tend to his death; and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. There is no question, also, but that taking any measures to render such treasonable purposes effectual,—as assembling and consulting on the means to kill the king,—is a sufficient overt act of treason (z).

(s) 3 Inst. 6.

(t) Plutarch *in vit. Dionysii*.

(u) By 7 Will. 3, c. 3, s. 8, it is provided, “that no evidence shall “be admitted or given of any overt “act that is not expressly laid in “the indictment, against any person or persons whatsoever.” And this seems to extend to all treasons

whereby any corruption of blood may ensue.

(x) 3 Inst. 12.

(y) 1 Hale, P. C. 109.

(z) “The law tendereth the safety “of the king with an anxious concern, and, if I may use the expression, with a concern bordering “on jealousy. It considereth the

[How far mere *words* spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. We have two instances in the reign of Edward the fourth, of persons executed for treasonable words,—the one a citizen of London, who said he would make his son heir of the *crown*, being the sign of the house in which he lived; the other a gentleman, whose favourite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly (*a*). These were esteemed hard cases: and the Chief Justice Markham rather chose to leave his place, than assent to the latter judgment (*b*). But now it seems clearly to be agreed, that, by the common law and the statute of Edward the third, words spoken amount only to a high misdemeanor and no treason. For

' wicked imaginations of the heart
' in the same degree of guilt as if
' carried into actual execution, from
' the moment measures appear to
' have been taken to render them
' effectual. And therefore if con-
' spirators meet and consult how to
' kill the king, though they do not
' then fall upon any scheme for that
' purpose, this is an overt act of
' compassing his death; and so are
' all means made use of,—be it ad-
' vice, persuasion, or command,—to
' incite or encourage others to com-
' mit the fact or join in the at-
' tempt; and every person who but
' assenteth to any overtures for that
' purpose will be involved in the
' same guilt.

"The care the law hath taken for
' the personal safety of the king is
' not confined to actions or attempts
' of the more flagitious kind—to
' assassination or poison, or other
' attempts directly or immediately
' aiming at his life: it is extended
' to everything wilfully and delibe-

"rately done or attempted, whereby
"his life may be endangered: and
"therefore the entering into mea-
"sures for deposing or imprisoning
"him, or to get his person into the
"power of the conspirators—these
"offences are overt acts of treason
"within this branch of the 25 Edw.
"3, c. 2."—Fost. 194, 195.

(*a*) 1 Hale, P. C. 115; 4 Bl. Com.
p. 80. The cases here referred to
by Blackstone, are those of William
Walker and of Sir Thomas Burdet.
But it is said in Stow's Chron. p.
415, that the charge against Walker
was for words spoken against the
title of the king when he was pro-
claimed; and it appears from Cro.
Car. p. 121, that the charge against
Burdet was of having conspired to
kill the king and prince by casting
their nativity, foretelling their speedy
death, and scattering papers contain-
ing the prophecy amongst the peo-
ple.—See Foss's Judges of England,
vol. iv. pp. 414—416.

(*b*) 1 Hale, P. C. 115.

[they may be spoken in heat, without any intention; or be mistaken, perverted or misremembered by the hearers; their meaning depends always on their connexion with other words and things; they may signify differently, even according to the tone of voice with which they are delivered; and sometimes silence itself is more expressive than any discourse. As, therefore, there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to treason; and accordingly in the fourth year of Charles the first, on a reference to all the judges, concerning some very atrocious words spoken by one Pyne, they certified to the king, “that though the words were as wicked as might be, “yet there was no treason: for, unless it be by some particular statute, no words will be treason (c).” If the words be set down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treason, for *scribere est agere*. But even in this case, the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason: particularly in the cases of one Peachum, a clergyman, for treasonable passages in a sermon never preached (d); and of Algernon Sidney, for some papers found in his closet; which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt acts of that treason, which was specially laid in the indictment (e). But being merely speculative, without any intention, so far as appeared, of making any public use of them, the convicting the authors upon such an insufficient foundation has been universally disapproved. Peachum was therefore pardoned; and though Sidney indeed was executed, yet it was to the general

(c) Pyne's case, Cro. Car. 117;
Williams's case, *ibid.* 126.

(d) Williams's case, *ubi sup.*
(e) Foster, 198.

[discontent of the nation, and his attainder was afterwards reversed by parliament. There was then no manner of doubt but that the publication of such a treasonable writing, was a sufficient overt act of treason at the common law (*f*); though of late even that has been questioned.

2. The second species of treason is, “if a man do “violate the king’s companion, or the king’s eldest “daughter unmarried, or the wife of the king’s eldest “son and heir.” By the king’s companion, is meant his wife; and by violation is understood carnal knowledge, as well without force as with it. And this is treason in both parties, if both be consenting, as some of the wives of Henry the eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious; and therefore when this reason ceases, the law ceases with it; for to violate a queen, or princess, dowager is held to be no treason (*g*). In like manner as, by the feudal law, it was a felony and attended with a forfeiture of the fief, if the vassal vitiated the wife, or daughter, of his lord (*h*); but not so, if he only vitiated his widow (*i*).

3. The third species of treason is, “if a man do levy “war against our lord the king in his realm.” And this may be done by taking arms, not only to dethrone the

(*f*) 1 Hale, P. C. 118; Hawk. P. C. b. 1, c. 17, s. 32.

(*g*) 3 Inst. 9. The instances specified in 25 Edw. III. c. 2, however, do not prove much consistency in the application of this reason; for there is no protection given to the wives of the younger sons of the king; though their issue must inherit the crown before the issues of the king’s eldest daughter: and her chastity

is only inviolable before marriage, whilst her children would be clearly illegitimate. Before the twenty-fifth year of Edward the third, it was held to be treason not only to violate the wife and daughter of the king, but also the nurses of his children, *les norices de leur enfans*. (Christian’s Blackstone.)

(*h*) Feud. l. 1, t. 5.

(*i*) Ibid.

[king, but under pretence to reform religion or the laws (*k*), or to remove evil councillors, or other grievances, whether real ~~or~~ pretended (*l*). For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power for these purposes in the high court of parliament. Neither does the constitution justify any private or particular resistance, for private or particular grievances; though in cases of national oppression, the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people. To resist the king's forces, by defending a castle against them, is a levying of war; and so is an insurrection with an avowed design to pull down *all* inclosures, *all* brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority (*m*). But a tumult with a view to pull down a particular house, or lay open a particular enclosure, amounts at most to a riot; this being no general defiance of public government. So if two subjects quarrel and levy war against each other,—in that spirit of private war which prevailed over all Europe in the early feudal times (*n*),—it is only a great riot and contempt, and no treason. Thus it happened between the Earls of Hereford and Gloucester, in the twentieth year of Edward the first; who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives: yet this was held to be no treason, but only a great misdemeanor (*o*). A bare conspiracy to levy war, does not amount to this species of treason; but if particularly pointed at the person of the king or his government, it falls within the first species,—viz., of compassing or imagining the king's death (*p*).]

(*k*) Doug. 590.

(*l*) Hawk. P. C. b. 1, c. 17, s. 25. 286.

(*m*) 1 Hale, P. C. 132.

(*n*) Robertson, Chas. V., vol. i. 45,

(*o*) 1 Hale, P. C. 136.

(*p*) 3 Inst. 9; Foster, 211, 213.

4. [“ If a man be adherent to the king’s enemies in his “ realm, giving to them aid and comfort in the realm or “ elsewhere,” he is also declared guilty of treason. *This must likewise be proved by some overt act, as by giving them intelligence(*q*); by sending them provisions; by selling them arms; by treacherously surrendering them a fortress, or the like (*r*). By enemies, are here understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the Crown of Great Britain, —the giving them assistance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom, or else in that of levying war against his majesty (*s*). And, most indisputably, the same acts of adherence or aid, which, when applied to foreign enemies, will constitute treason under this branch of the statute, will, when afforded to our own fellow-subjects in actual rebellion at home, amount to the same crime, under the description of levying war against the king (*t*). But to relieve a rebel, fled out of the kingdom, is no treason; for the statute is taken strictly, and a rebel is not an *enemy*; an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England(*u*). And, if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies *in* the kingdom, provided he leaves them whenever he hath a safe opportunity.]

5. [The last species of treason under this statute is, “ If “ a man slay the chancellor, treasurer, or the king’s justices of the one bench or the other, justices in eyre or

(*q*) Dr. Hensy’s case, 1 Burr. 650;
R. v. Stone, 6 T. R. 527.

(*t*) Ibid. 216.

(*r*) 3 Inst. 10.

(*u*) Hawk. P. C. b. 1, c. 17, s. 28.

(*s*) Foster, 219.

[“justices in assize, and all other justices assigned to hear “and determine, being in their places doing their offices.” These high magistrates, as they represent the king’s majesty during the execution of their offices, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, and not to wounding or a bare attempt to kill them. It extends also only to the officers therein specified; and therefore the barons of the Exchequer, as such, are not within the protection of this Act (x); but the lord keeper, or commissioners, of the Great Seal now seem to be within it,—by virtue of the statutes 5 Eliz. c. 18, and 1 Will. & Mary, c. 21 (y).

Thus careful was the legislature in the reign of Edward the third, to specify and reduce to a certainty the vague notions of treason that had formerly prevailed in our courts. But the Act does not stop here, but goes on: “Because “other like cases of treason may happen in time to come, “which cannot be thought of or declared at present, it is “accorded, that if any other case supposed to be treason, “which is not above specified, doth happen before any “judge, the judge shall tarry without going to judgment “of the treason, till the cause be showed and declared “before the king and his parliament, whether it ought “to be judged treason or other felony.” Sir M. Hale is very high in his encomiums on the great wisdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this Act, by not suffering them to run out upon their own opinions into constructive treasons,

(x) 1 Hale, P. C. 231.

(y) By the statute 7 Anne, c. 21, it is made treason to slay any of the lords of session, or lords of justiciary, sitting in judgment. It is also provided, that the crimes of treason, and misprision of treason, shall be exactly the same in England and Scotland; and that no acts in Scot-

land, except those above specified, shall be construed as treason in Scotland, which are not treason in England; and that all persons prosecuted in Scotland, for treason, or misprision thereof, shall be tried in the same manner as if they had been prosecuted for the same crime in England.

[though in cases that seem to them to have a like parity of reason; but reserving them to the decision of parliament (z). This is a great security to the public, the judges, and even this sacred Act itself; and leaves a weighty *memento* to judges to be careful, and not over-hasty in letting in treasons by construction or interpretation, especially in new cases that have not been resolved and settled. Sir M. Hale also observes, that as the authoritative decision of these *casus omissi* is reserved to the king and parliament, the most regular way to do it is by a new declarative Act; and therefore the opinion of any one or of both houses, (though of very respectable weight,) is not that solemn declaration referred to by this Act, as the only criterion for judging of future treasons (a).

In consequence of this power,—not originally indeed granted by the statute of Edward the third, but constitutionally inherent in every subsequent parliament, which cannot be abridged of any rights by the act of a precedent one,—the legislature was extremely liberal in declaring new treasons in the unfortunate reign of King Richard the second; as particularly the killing of an ambassador was made so. Which seems to be founded upon better reason than the multitude of other points that were then strained up to this high offence; the most arbitrary and absurd of all which was by the statute 21 Ric. II. c. 3,—which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, treason. And yet so little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered. And in the very first year of his successor's reign an Act was passed, reciting “that no man knew how he ought to behave himself, to do, speak or say, for doubt of such pains of treason; and therefore it was accorded, that in no time to come any treason be judged, otherwise than was ordained by the statutes of King Edward the third” (b). This at

(z) 1 Hale, P. C. 259.

(b) Stat. 1 Hen. 4, c. 10.

(a) Ibid.

[once swept away the whole load of extravagant treasons, introduced in the time of Richard the second.

But afterwards, between the reign of Henry the fourth and Queen Mary, and particularly in the bloody reign of Henry the eighth, the spirit of inventing new and strange treasons was revived. Among which, we may reckon the offences of clipping money; breaking prison or rescue when the prisoner is committed for treason; burning houses to extort money: stealing cattle by Welshmen; counterfeiting foreign coin; wilful poisoning; execrations against the king, calling him opprobrious names by public writing; refusing to abjure the pope; deflowering or marrying, without the royal licence, any of the king's children, sisters, aunts, nephews or nieces; bare solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or *believing*, (manifested by an overt act,) the king to have been lawfully married to Anne of Cleves; derogating from the king's royal style and title, impugning his supremacy, and assembling riotously to the number of twelve, and not dispersing upon proclamation. All which new-fangled treasons were totally abrogated by the statute] 1 Edward VI. c. 12, (confirmed by statute 1 Mary, c. 1), which [once more reduced all treasons to the standard of the statute of the twenty-fifth year of Edward the third.] But since the reign of Mary, addition has again been made to the number of treasonable offences created by act of parliament. For [by statute 1 Anne, st. 2, c. 17, s. 3, if any person shall endeavour to deprive or hinder any person, being the next in succession to the Crown according to the limitations of the Act of Settlement, from succeeding to the Crown, and shall maliciously and directly attempt the same by any overt act,—such offence shall be treason. By statute 6 Anne, c. 7, if any person shall maliciously, advisedly, and directly, by writing or print-

[ing, maintain and affirm that any other person hath any right or title to the Crown of this realm, otherwise than according to the Act of Settlement; or that the kings of this realm, with the authority of parliament, are not able to make laws and statutes to bind the Crown and the descent thereof,—such person shall be guilty of treason. This offence, (or indeed maintaining this doctrine in anywise, that the king and parliament cannot limit the Crown,) was once before made treason by statute 13 Eliz. c. 1, during the life of that princess. And after her decease, it continued a high misdemeanor; punishable with forfeiture of goods and chattels, even in the most flourishing era of indefeasible hereditary right, and *jure divino* succession. But it was again raised into treason, by the statute of Anne above mentioned, at the time of a projected invasion in favour of the then pretender; and upon this statute one Matthews, a printer, was convicted and executed, in 1719, for printing a treasonable pamphlet, entitled “*Vox populi vox Dei*”(c).] Lastly, by 36 Geo. III. c. 7(d), if any person shall, within the realm or without, compass, imagine or intend death, destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the king, his heirs and successors; and shall express, utter or declare such intention by publishing any printing or writing, or by any overt act,—he shall be adjudged a traitor.

(c) State Tr. ix. 680.

(d) The 36 Geo. 3, c. 7 (which was at first temporary only), was made perpetual by 57 Geo. 3, c. 6; and it having been doubted whether it extended to Ireland, it is now expressly extended to that country by 11 & 12 Vict. c. 12. It was also provided by the Act of Geo. 3, that it should be treason to compass, imagine or intend (such intention being expressed by print, writing, or overt act,) to deprive or depose the king or his successors

from the style, honour or kingly name of the imperial Crown, or to levy war within the realm, in order by force to compel the sovereign to change his measures or counsels, or to overawe either house of parliament; or to stir any foreigner with force to invade this realm, or any of the king's dominions. But as to this part of its enactments, the statute of Geo. 3 is now repealed, and the offences are differently dealt with, by 11 & 12 Vict. c. 12; as to which, vide post, p. 250.

[Thus much for the crime of treason, or *læsæ majestatis*, in all its branches (e); which consists, we may observe, originally, in grossly counteracting that allegiance which is due from the subject by either birth or residence; though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them to depart a little from this primitive idea. It is now, however, time to pass on from defining the crime, to describing its punishment.]

The offence of treason is, (by exception from the general rule of the Crown law,) subject to limitation in respect of time. For by 7 Will. III. c. 3, no person shall be prosecuted for treason, but within three years after the commission of the offence; except in the case of a designed assassination of the sovereign, by poison or otherwise (f).

The punishment of treason is very solemn and terrible.

1. That the offender be drawn on a hurdle, to the place of execution.
2. That he be hanged by the neck, until he be dead.
3. That his head be severed from the body.
4. That his body be divided into four quarters.
5. That

(e) Besides the above treasons, Blackstone (vol. iv. pp. 88 et seq.) mentions many others created since the reign of Mary, which he divides into—1st, such as relate to Papists; 2nd, such as relate to falsifying the coin or other royal signatures; and 3rd, those created for the security of the Protestant succession in the house of Hanover. But the statutes of the two first classes, have been repealed by the 7 & 8 Vict. c. 102, and 2 Will. 4, c. 34; and those of the third, (with the exception of such as are noticed in the text,) have lost their importance by the extinction of the line of the Pretender, against whom their provisions were directed. It

may also be here observed, that the statute 3 & 4 Vict. c. 52,—which appointed the late Prince Consort regent to any issue of Her Majesty coming to the throne before the age of eighteen,—contains a clause (sect. 4), making it a treasonable offence in any person who shall marry (or be concerned in procuring the marriage of), without consent of the regent, and assent of the two houses of parliament, “the king or queen of this realm, for whom a regent is hereby appointed.”

(f) As to the law relative to the manner of indictment, arraignment, trial and attainder in treason (which is in some respects peculiar), vide post, cc. XVIII. XXII.

his head and quarters shall be at the disposal of the Crown. But the king may, after sentence, by warrant under his sign-manual countersigned by a principal secretary of state, change the whole sentence into beheading. And the sentence upon women, (the decency due to whose sex forbids the exposing and publicly mangling their bodies,) is, to be drawn to the place of execution, and hanged by the neck until they be dead (*g*).

The consequences of judgment for the crime of treason, viz. attainder, forfeiture and corruption of blood, must be referred to the latter end of this book, when we shall treat of them all together,—as well in treason, as for other offences (*h*).

We proceed next to consider certain offences which though they fall short of treason, are, like it, injurious to the person, prerogative, or government of the sovereign.

II. The offence of *misprision* of treason.

[Misprisions, a term derived from the old French *mespris*, a neglect or contempt, are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but closely bordering thereon: and it is said that a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision

(*g*) In Blackstone's time (see vol. iv. p. 92), the punishment of treason was still more dreadful; for as the law then stood (in addition to solemnities which still obtain), the traitor, if a male, was, 1st, to be drawn on a sledge or hurdle to the gallows; 2nd, to be hanged by the neck, and then cut down alive; and 3rdly, his entrails were to be taken out and burned while he was yet alive. And if a woman, she was to be drawn to the gallows, and

there burned alive. But the sentence was altered to the form in which it is stated above, by 30 Geo. 3, c. 48, s. 1, and 54 Geo. 3, c. 146.

The antient punishment of treason, (according to Sir E. Coke,) is warranted by divers examples in Scripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and so of the rest. (3 Inst. 211.)

(*h*) Vide post, c. xxiii.

[only (i). And upon the same principle, while the jurisdiction of the Star Chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court merely for a high misdemeanor: as happened in the case of Roger, Earl of Rutland, in the forty-third year of Elizabeth, who was concerned in the Earl of Essex's rebellion (j).] Misprisions are generally divided in our books [into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.] The latter, however, are not denominated in common language as misprisions, but rather as *contempts* or *high misdemeanors* (k). Misprision of treason consists [of the bare knowledge and concealment of treason, without any degree of assent thereto, for any assent makes the party a principal traitor: as indeed the concealment, which was construed aiding and abetting, did at the common law; in like manner as the knowledge of a plot against the State, and not revealing it, was a capital crime at Florence and other States of Italy (l). But it is now enacted by the statute 1 & 2 P. & M. c. 10, that a bare concealment of treason, shall be only held a misprision.

This concealment becomes criminal if the party apprised of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace (m). But if there be any probable circumstances of assent,—as if one goes to a treasonable meeting, knowing beforehand that a conspiracy is intended against the king; or, being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of, but conceals it:—this is an implied assent in law, and makes the concealer guilty of actual treason (n).

(i) Year Book, 2 Rich. 3, 10; Staundf. P. C. 37; Kel. 71; 1 Hale, P. C. 374; Hawk. P. C. b. 1, c. 20.

(j) Hudson, of the Court of Star Chamber, MS. in Mus. Brit.; Col-

lectanea Juridica, vol. ii. p. 1—241.

(k) 4 Bl. Com. 121.

(l) Guicciard. Hist. b. 3 and 13.

(m) 1 Hale, P. C. 372.

(n) Hawk. P. C. b. 1, c. 20, s. 3.

[The punishment of misprision of treason is loss of the profit of lands during life, forfeiture of goods, and imprisonment during life(*o*); which total forfeiture of the goods was originally inflicted while the offence amounted to principal treason, and, of course, included in it a felony by the common law.] It is, therefore, no exception to the general rule laid down in a former chapter, that, wherever an offence is punished by such total forfeiture, it is felony at the common law (*p*).

III. A third offence falling under the denomination of the present chapter, is one provided against by 5 & 6 Vict. c. 51. It is that of a person who shall wilfully discharge, or point, aim, or present, at the person of the Queen, any gun or other arms, whether containing explosive materials or not; or shall strike at or attempt to throw any thing upon the Queen's person; or produce any fire-arms or other arms, or any explosive or dangerous matter, near her majesty's person;—with intent, in any of these cases, to injure or alarm her, or to commit a breach of the peace. And any one so offending, is guilty of a high misdemeanor: and is made liable to penal servitude for seven or not less than three years; or to imprisonment for not more than three years, and (if the court shall so direct) whipped not more than thrice during that period(*q*).

IV. A fourth offence of this nature has also been made the subject of recent legislation. For by 11 & 12 Vict. c. 12, intituled “An Act for the better security of “the Crown and Government of the United Kingdom,” it is enacted, that if any person shall,—within the united kingdom, or without,—compass, imagine, invent, devise, or intend to deprive or depose the Queen, her heirs or successors, from the style, honour, or royal name of the imperial Crown of the united kingdom, or of any of her majesty's dominions and countries; or to levy war against her majesty, her heirs or successors, within any part of the

(*o*) 1 Hale, P. C. 374.

(*p*) Vide sup. pp. 92, 95.

(*q*) See 5 & 6 Vict. c. 51; 16 & 17

Vict. c. 99; 20 & 21 Vict. c. 3.

united kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, both houses or either house of parliament(*r*); or to move or stir any foreigner or stranger with force to invade the united kingdom, or any other of her majesty's dominions or countries under the obeisance of her majesty, her heirs or successors; and shall express, utter or declare such compassings, imaginations, inventions, devices or intentions, or any of them, by publishing any printing or writing, or by any overt act or deed;—the person so offending shall be guilty of felony(*s*). And on conviction he is liable, at the discretion of the court, to be sentenced to penal servitude for life, or for any term not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, as the court shall direct(*t*). And there is a proviso, that if the facts alleged in the indictment, or proved on the trial of any person charged with felony under 11 & 12 Vict. c. 12, shall amount in law to treason,—such indictment shall nevertheless not be deemed void, erroneous or defective; nor shall such person be entitled to be acquitted of such felony; but that no person tried for the felony, shall afterwards be prosecuted for treason upon the same facts(*u*).

V. A fifth offence of this nature [may be by speaking or writing against the sovereign; cursing or wishing him

(*r*) As to the *treasonable* offence of levying war against the king in his realm, vide sup. p. 240. It is to be observed that nothing contained in the present Act, is to lessen the force or in any manner affect anything enacted by the statute of Edw. 3.

(*s*) Three prosecutions under this statute, will be found reported in 3 Cox, C. C., pp. 509, 517, 526.

(*t*) 11 & 12 Vict. c. 12; 16 & 17

Vict. c. 99; 20 & 21 Vict. c. 3.

(*u*) This Act also brought within its provisions the expression, utterance or declaration of any such compassings, imaginations, inventions, devices or intentions as are mentioned in the text, by *open and advised speaking* only; but by sect. 4, prosecutions for such felonies were to be had only within a certain period after the passing of the Act; which period has now expired.

[ill; giving out scandalous stories concerning him,]—as asserting falsely that he labours under mental derangement (*t*),—or [doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has been also held an offence of this species, to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die; these being acts which impliedly encourage rebellion: and for this species of contempt a man may not only be fined and imprisoned, but suffer corporal punishment (*u*).

VI. Under the general title of this chapter we must also advert to *Præmunire*. And this offence, which forms the subject of many stringent statutes still unrepealed though long since dormant, deserves, from its connection with our political and ecclesiastical history, a more full and particular consideration, than its degree of importance as a matter of practical law might appear to deserve (*v*).

The offence of *præmunire*, was so called from the words of the writ preparatory to the prosecution thereof: *præmunire facias A. B. (x)*, cause A. B. to be forewarned that

(*t*) See *R. v. Harvey*, 2 B. & C. 257.

(*u*) Hawk. P. C. b. 1, c. 23, s. 3. Blackstone remarks (vol. iv. p. 123), that in the antient German empire, such persons as endeavour to sow sedition and disturb the public tranquillity were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another. The Emperors Otho the first and Frederick Barbarossa inflicted this punishment on noblemen of the highest rank; Blackstone cites *Mod. Un. Hist.* xxix. 28, 119.

(*v*) The terrible penalties of a *præmunire* are denounced by a great variety of statutes, yet prosecutions

upon a *præmunire* are unheard of in our courts. There is only one instance of such a prosecution in the State Trials; in which case the penalties of a *præmunire* were inflicted upon some persons for refusing to take the oath of allegiance in the reign of Charles the second. Harg. St. Tr. vol. ii. p. 463.—Ch.

(*x*) A barbarous word for *præmuneri*. *Præmunere*, in law Latin, is used in all its tenses and participles for *præmonere*, or *cito*. (Ducange, Gloss.) Fuller (Cent. xiv. p. 148) suggests that *præmunire* means to fence and fortify the regal power from foreign assault; and this is adopted by D'Aubigné in his *Hist. of the Reformation*, (vol. v. p. 107.)

[he appear before us to answer the contempt wherewith he stands charged ; which contempt is particularly recited in the preamble to the writ (*y*). It took its original, from the exorbitant power claimed and exercised in England by the Pope ; which, even in the days of blind zeal, was too heavy for our ancestors to bear.

It may justly be observed, that religious principles,—which, when genuine and pure, have an evident tendency to make their professors better citizens as well as better men,—have, when perverted and erroneous, been usually subversive of civil government ; and been made both the cloak and the instrument, of every pernicious design that can be harboured in the heart of man. The unbounded authority that was exercised by the Druids in the west, under the influence of pagan superstition, and the terrible ravages committed by the Saracens in the east, to propagate the religion of Mahomet,—both witness to the truth of that antient universal observation, that, in all ages and in all countries, civil and ecclesiastical tyranny are mutually productive of each other. It is, therefore, the glory of the Church of England, that she inculcates due obedience to lawful authority ; and hath been, as her prelates on a trying occasion once expressed it, in her principles and practice most unquestionably loyal (*z*). The clergy of her persuasion, holy in their doctrines, and unblemished in their lives and conversation, are also moderate in their ambition, and entertain just notions of the ties of society and the rights of civil government. As in matters of faith and morality they acknowledge no guide but the Scriptures, so in matters of external polity and of private right they derive all their title from the civil magistrate ; they look up to the king as their head, to the parliament as their lawgiver ; and pride themselves in nothing more justly than in being true members of the Church, emphatically *by law* established. Whereas the notions of ecclesiastical liberty in those who

But the account of the word given 1534.

by Ducange, seems the true one.

(*z*) Address to James the second,

(*y*) Old Nat. Brev. 101, edit. 1687.

[differ from them, as well in one extreme as in the other, (for we here only speak of extremes,) are equally and totally destructive of those ties and obligations by which all society is kept together: equally encroaching on those rights which reason and the original contract of every free state in the universe, have vested in the sovereign power; and equally aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned. The dreadful effects of such a religious bigotry, when actuated by erroneous principles, even of the protestant kind, are sufficiently evident from the history of the anabaptists in Germany, the covenanters in Scotland, and that deluge of sectaries in England who murdered their sovereign, and overturned the church and monarchy. But these horrid devastations, the effects of mere madness, or of zeal that was nearly allied to it, though violent and tumultuous, were but of short duration: whereas the progress of papal policy, long actuated by the steady counsels of successive pontiffs, took deeper root; and was at length, in some places with difficulty, in others never yet extirpated. For this we might call to witness the black intrigues of the Jesuits, at one time triumphant over Christendom; but the subject under our present consideration rather leads us to investigate the vast strides which were formerly made in this kingdom by the popish clergy,—how nearly they arrived to effecting their grand design,—some few of the means they made use of for establishing their plan,—and how almost all of them have been defeated or converted to better purposes, by the vigour of our free constitution and the wisdom of successive parliaments.

The antient British Church, by whomsoever planted, was a stranger to the bishop of Rome and all his pretended authority. But the pagan Saxon invaders, having driven the professors of Christianity to the remotest corners of our island, their own conversion was afterwards effected by Augustin the monk and other missionaries from the court of Rome. This naturally introduced some few of the papal

[corruptions in point of faith and doctrine; but we read of no civil authority claimed by the Pope in these kingdoms till the æra of the Norman conquest; when the then reigning pontiff, having favoured Duke William in his projected invasion by blessing his host and consecrating his banners, took that opportunity also of establishing his spiritual encroachments; and was even permitted so to do by the policy of the Conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates—prelates, who, being bred abroad in the doctrine and practice of slavery, had contracted a reverence and regard for it, and took a pleasure in riveting the chains of a free-born people.

The most stable foundation of legal and rational government, is a due subordination of rank, and a gradual scale of authority; and tyranny also itself is most surely supported, by a regular increase of despotism arising from the slave to the sultan. With this difference, however, that the measure of obedience in the one is grounded on the principles of society, and is extended no further than reason and necessity will warrant; in the other it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded. More effectually therefore to enslave the consciences and minds of the people, the Romish clergy themselves paid the most implicit obedience to their own superiors or prelates: and they, in their turns, were as blindly devoted to the will of the sovereign pontiff; whose decisions they held to be infallible, and his authority coextensive with the Christian world. Hence his legates, *à latere*, were introduced into every kingdom in Europe; his bulls and decretal epistles became the rule both of faith and discipline; his judgment was the final resort in all cases of doubt or difficulty; his decrees were enforced by anathemas and spiritual censures; he dethroned even kings that were refractory; and denied to whole kingdoms, when undutiful, the exercise of Christian ordinances, and the benefits of the gospel of God.

[But though the being spiritual head of the Church was a thing of great sound, and of greater authority, yet the court of Rome was fully apprised that among the bulk of mankind power cannot be obtained without property; and therefore its attention began very early to be riveted upon every method that promised pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchase of masses to redeem the souls of the deceased. New-fangled offences were created and indulgences were sold to the wealthy, for liberty to sin without danger.

The canon law took cognizance of crimes, enjoined penances *pro salute animæ*, and commuted that penance for money. Non-residence and pluralities among the clergy, and marriages among the laity related within the seventh degree, were strictly prohibited by canon; but dispensations were seldom denied to those who could afford to buy them. In short, all the wealth of Christendom was gradually drained by a thousand channels into the coffers of the holy see.

The establishment also of the feudal system in most of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for usurping a similar authority over all the preferments of the Church, which began first in Italy, and gradually spread into England.

The Pope became a feudal lord, and all ordinary patrons were to hold their right of patronage under this universal superior. Estates held by feudal tenure, being originally gratuitous donations, were at that time denominate *beneficia*; their very name as well as constitution was borrowed, and the care of the souls of a parish thence came to be denominated a *benefice* (a). Lay fees were conferred by investiture or delivery of corporal possession; and spiritual benefices, which at first were universally donative, now received in like manner a spiritual investiture by institution from the bishop, and induction under his autho-

(a) Vide sup. vol. I. p. 178.

[rity. As lands escheated to the lord in defect of a legal tenant, so benefices lapsed to the bishop upon nonpresentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy, were equivalent to the feudal render, or rent, reserved upon a grant: the oath of canonical obedience was copied from the oath of fealty required from the vassal by his superior: the *primer seisins* of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first-fruits from the beneficed clergy: and the occasional aids and talliages levied by the prince on his vassals, gave a handle to the Pope to levy, by the means of his legates *à latere*, Peterpence and other exactions.

At length the holy father went a step beyond any example, of either emperor or feudal lord: he reserved to himself, by his own apostolical authority, the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither or back again; and, moreover, such also as became vacant by his promotion to a bishopric or abbey, "*etiamsi ad illa personæ consueverint et debu-erint per electionem, aut quemvis alium modum, assumi*"(b). And this last, the canonists declared, was no detriment at all to the patron, being only like the change of a life in a feudal estate by the lord.

Dispensations to avoid these vacancies begat the doctrine of *commendams*(c); and papal *provisions* were the previous nomination to such benefices before they became actually void, though afterwards indiscriminately applied to any right of patronage exerted or usurped by the Pope. In consequence of which the best livings were filled by Italian and other foreign clergy; equally unskilled in, and adverse to, the laws and constitutions of England. The very nomination to bishoprics,—that antient prerogative of the Crown,—was wrested from King Henry the first,

(b) Extrav. l. 3, t. 2, c. 13.

(c) Vide sup. vol. III. p. 37.

[and afterwards from his successor King John, and seemingly indeed conferred on the chapters belonging to each see; but, by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually vested in the Pope. And to sum up this head with a transaction most unparalleled and astonishing in its kind, Pope Innocent the third had at length the effrontery to demand, and King John the meanness to consent to, a resignation of his crown to the Pope, whereby England was to become for ever St. Peter's patrimony; and the dastardly monarch re-accepted his sceptre from the hands of the papal legate, to hold as the vassal of the holy see, at the annual rent of a thousand marks.

Another engine set on foot, or at least greatly improved by the court of Rome, was a masterpiece of papal policy. Not content with the ample provision of tithes which the law of the land had given to the parochial clergy, they endeavoured to grasp at the lands and inheritances of the kingdom; and had not the legislature withstood them, would in time probably have been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine, and other rules; men of sour and austere religion, separated from the world and its concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretences to extraordinary sanctity, while all their aim was to aggrandize the power and extend the influence of their grand superior the Pope. And as in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe that founding a monastery a little before their deaths would atone for a life of incontinence, disorder and bloodshed. Hence innumerable abbeys and religious houses were built within a century after the Conquest, and endowed not only with the tithes of parishes, (which were ravished from the secular clergy,) but also with lands, manors, lordships, and

[extensive baronies. And the doctrine inculcated was, that whatever was so given to, or purchased by, the monks and friars, was consecrated to God himself; and that to alienate or take it away was no less than the sin of sacrilege.

We might here have enlarged upon other contrivances set on foot by the court of Rome, for effecting an entire exemption of its clergy from any intercourse with the civil magistrate;—such as the separation of the ecclesiastical court from the temporal; the appointment of its judges by merely spiritual authority, without any interposition from the Crown; the exclusive jurisdiction it claimed over all ecclesiastical persons and causes (*d*); and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or punishment except before their own tribunal (*e*). But we shall only observe, at present, that notwithstanding this plan of pontifical power was so deeply laid, and was so indefatigably pursued by the unwearied politics of the court of Rome, through a long succession of ages; notwithstanding it was polished and improved by the united endeavours of a body of men who engrossed all the learning of Europe, for centuries together; notwithstanding it was firmly and resolutely executed by persons the best calculated for establishing tyranny and despotism, —being fired with a bigoted enthusiasm which prevailed not only among the weak and simple, but even among those of the best natural and acquired endowments; and being unconnected with their fellow subjects, and totally indifferent what might befall that posterity to which they bore no endearing relation;—yet it vanished into nothing when the eyes of the people were a little enlightened, and they set themselves with vigour to oppose it. So vain and ridiculous is the attempt to live in society, without acknowledging the obligations which it lays us under: and to affect an entire independence of that civil state, which

(*d*) As to the history and progress of the ecclesiastical courts, vide sup. vol. III. pp. 437 et seq. (*e*) As to the benefit of clergy vide post, c. XXIII.

[protects us in all our rights; and gives us every other liberty, that only excepted of despising the laws of the community.

Having thus in some degree endeavoured to trace out the original and subsequent progress of the papal usurpation, let us now return to the statutes of *præmunire*; which were framed to encounter this overgrown, yet increasing evil. King Edward the first, a wise and magnanimous prince, set himself in earnest to shake off this servile yoke (*f*). He would not suffer his bishops to attend a general council, until they had sworn not to receive the papal benediction. He made light of all papal bulls and processes: attacking Scotland in defiance of one; and seizing the temporalities of his clergy, who, under pretence of another, refused to pay a tax imposed by parliament. He strengthened the statutes of mortmain; thereby closing the great gulph, in which all the lands of the kingdom were in danger of being swallowed. And one of his subjects having obtained a bull of excommunication against another, he ordered him to be executed as a traitor, according to the antient law (*g*). And in the thirty-fifth year of his reign, was made the first statute against papal provisions; being, according to Sir Edward Coke, the foundation of all the subsequent statutes of *præmunire* (*h*); which we rank as an offence immediately against the sovereign, because every encouragement of the papal power is a diminution of the authority of the Crown.

In the weak reign of Edward the second, the Pope again endeavoured to encroach, but the parliament manfully withstood him; and it was one of the principal articles charged against that unhappy prince, that he had given allowance to the bulls of the see of Rome. But Edward the third, was of a temper extremely different: and to remedy these

(*f*) Dav. 83, &c.

3 Ass. 19.

(*g*) Bro. Abr. tit. Coronæ, 115;

(*h*) 2 Inst. 583.

Treason, 14; 5 Rep. part 1, fol. 12;

[inconveniences first by gentle means, he and his nobility wrote an expostulation to the Pope; but receiving a menacing and contemptuous answer,—withal acquainting him that the Emperor, who, a few years before, at the Diet of Nuremburg, A.D. 1323, had established a law against provisions, and also the king of France, had lately submitted to the holy see (*i*);—the king replied, that if both the Emperor and the French king should take the Pope's part, he was ready to give battle to them both in defence of the liberties of the Crown. Hereupon more sharp and penal laws were devised against provisos (*k*); which enact, severally, that the court of Rome shall not present or collate to any bishopric or living in England: and that whoever disturbs any patron in the presentation to a living, by virtue of a papal provision, such provisor shall pay fine and ransom to the king at his will, and be imprisoned till he renounces such provision; and the same punishment is inflicted on such as cite the king, or any of his subjects, to answer in the court of Rome. And when the holy see resented these proceedings, and Pope Urban the fifth attempted to revive the vassalage and annual rent to which King John had subjected the kingdom, it was unanimously agreed by all the estates of the realm, in parliament assembled, in the fortieth year of Edward the third, that King John's donation was null and void; being without the concurrence of parliament, and contrary to his coronation oath. And all the temporal nobility and commons engaged, that if the Pope should endeavour, by process or otherwise, to maintain these usurpations, they would resist and withstand him to the utmost of their power (*l*).

In the reign of Richard the second, it was found necessary to sharpen and strengthen these laws; and therefore it was enacted by statutes 3 Ric. II. c. 3, and 7 Ric. II. c. 12, first, that no alien should be capable of letting his benefice

(*i*) See Mod. Un. Hist. xxix. 293. c. 4; and st. 2, cc. 1, 2, 3, 4.

(*k*) Stat. 25 Edw. 3, st. 6; 27 (l) Seld. in Flet. 10, 4.
Edw. 3, st. 1, c. 3; 38 Edw. 3, st. 1,

[to farm,—in order to compel such as had crept in, at least to reside on their preferments; and afterwards that no alien should be capable of being presented to any ecclesiastical preferment, under the penalties of the statutes of provisors (*m*). By the statute 12 Ric. II. c. 15, all liege men of the king accepting of a living by any foreign provision, are put out of the king's protection, and the benefice made void. To which the statute 13 Ric. II. st. 2, c. 2, adds banishment and forfeiture of lands and goods; and by the third chapter of the same statute, any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, shall be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member.

In the writ for the execution of all these statutes, the words *præmunire facias* being, (as we said,) used to demand a citation of the party, have denominated in common speech not only the writ, but the offence itself of maintaining the papal power, by the name of *præmunire*: and accordingly the next statute we shall mention,—which is generally referred to by all subsequent statutes,—is usually called the Statute of *Præmunire*. It is the statute 16 Ric. II. c. 5; which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or other things which touch the king, against him, his Crown and realm; and all persons aiding and assisting therein; shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council; or process of *præmunire facias* shall be made out against them, as in other case of provisors.

By the statute 2 Hen. IV. c. 3, all persons who accept any provision from the Pope, to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of *præmunire*. And this is the last of our

(*m*) Vide sup. vol. III. p. 28.

[antient statutes touching this offence; the usurped civil power of the bishop of Rome being pretty well broken down by these statutes, as his usurped religious power was in about a century afterwards; the spirit of the nation being so much raised against foreigners, that about this time, in the reign of Henry the fifth, the alien priories or abbeyes for foreign monks were suppressed, and their lands given to the Crown.] And even prior to the Reformation, all further attempts on the part of our own ecclesiastics to support these foreign jurisdictions had ceased.

[A learned writer above referred to, is therefore greatly mistaken, when he says (*n*), that in the time of Henry the sixth, the archbishop of Canterbury and other bishops offered to the king a large supply, if he would consent that all laws against provisors, and especially the statute of 16 Ric. II., might be repealed; but that this motion was rejected. This account is incorrect in all its branches. For, first, the application which he probably means, was made not by the bishops only, but by the unanimous consent of a provincial synod, assembled in 1439, in the eighteenth year of Henry the sixth; that very synod, which at the same time refused to confirm and allow a papal bull, which was then laid before them. Next, the purport of it was not to procure a repeal of the statutes against provisors, or that of Richard the second in particular; but to request that the penalties thereof,—which were applied by a forced construction to all that sued in the spiritual, and even in many temporal courts of this realm,—might be turned against the proper objects only, those who appealed to Rome, or to any foreign jurisdictions; the tenor of the petition being, “that those penalties should be taken to
“ extend only to those that commenced any suits, or pro-
“ cured any writs or public instruments at Rome, or else-
“ where out of England; and that no one should be pro-
“ secuted upon that statute for any suit in the spiritual
“ courts, or lay jurisdictions of this kingdom.” Lastly,

[the motion was so far from being rejected, that the king promised to recommend it to the next parliament; and, in the mean time, that no one should be molested upon this account. And the clergy were so satisfied with their success, that they granted to the king a whole tenth upon this occasion (o).

And, indeed; so far was the archbishop, who presided in this synod, from countenancing the usurped power of the Pope in this realm, that he was ever a firm opposer of it. And, particularly, in the reign of Henry the fifth, he prevented the king's uncle from being then made a cardinal, and legate *à latere* from the Pope; upon the mere principle of its being within the mischief of papal provisions, and derogatory from the liberties of the English Church and nation. For, as he expressed himself to the king in his letter upon the subject, "he was bound to oppose it by his ligeance, and also to quit himself to God, and the church of this land, of which God and the king had made him the governor." This was not the language of a prelate addicted to the slavery of the see of Rome; but of one who was indeed of principles so very opposite to the papal usurpations, that in the year preceding this synod, the seventeenth year of Henry the sixth, he refused to consecrate a bishop of Ely that was nominated by Pope Eugenius the fourth,—a conduct quite consonant to his former behaviour in the sixth year of Henry the sixth, when he refused to obey the commands of Pope Martin the fifth, who had required him to exert his endeavours to repeal the statute of *præmunire*; "*illud execrabile statutum*," as the holy father phrases it; which refusal so far exasperated the court of Rome against him, that at length the Pope issued a bull to suspend him from his office and authority, which the archbishop disregarded, and appealed to a general council. And so sensible were the nation of their prince's merit, that the lords spiritual and temporal, and also the University of Oxford, wrote

[letters to the Pope in his defence; and the house of commons addressed the king to send an ambassador forthwith to his holiness, on behalf of the archbishop, who had incurred the displeasure of the Pope for opposing the excessive power of the court of Rome (*p*).

This, then, is the original meaning of the offence which we call *præmunire*, viz., introducing a foreign power into this land; and creating *imperium in imperio*, by paying that obedience to papal process which constitutionally belonged to the king alone, long before the Reformation in the reign of Henry the eighth. At which time the penalties of *præmunire*, were indeed extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the see of Rome, though not all the corrupted doctrines of the Romish Church. And, therefore, by the several statutes of 24 Hen. VIII. c. 12, and 25 Hen. VIII. cc. 19 and 21, to appeal to Rome from any of the king's courts, (which, though illegal before, had at times been connived at); to sue to Rome for any licence or dispensation; or to obey any process from thence;—are made liable to the pains of *præmunire*. And in order to restore to the king in effect the nomination of vacant bishoprics, and yet keep up the established forms,—it is enacted by statute 25 Hen. VIII. c. 20, that if the dean and chapter refuse to elect the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of *præmunire* (*q*).]

So also [by statute 13 Eliz. c. 2, to import any *agnus Dei*, crosses, beads, or other superstitious things pretended to be hallowed by the Bishop of Rome, and tender the same to be used; or to receive the same with such intent, and not discover the offender;] brought on the offenders the penalties of a *præmunire*. But the penalties or punishments imposed by this Act of Eliza-

(*p*) See Wilk. Concil. Magn. Br. of Archbishop Chichele.
vol. iii. *passim*, and Dr. Duck's Life

(*q*) Vide sup. vol. iii. p. 9.

beth are now recently repealed, by the statute 9 & 10 Vict. c. 59 (*r*).

[Thus far the penalties of *præmunire* seem to have kept within the proper bounds of their original institution, the depressing the power of the Pope; but they being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offences; some of which bear more and some less relation to this original offence, and some no relation at all.

Thus, 1. By the statute 1 & 2 Ph. & M. c. 8, to molest the possessors of abbey lands granted by parliament to Henry VIII. and Edward VI., was made a *præmunire*. 2. To obtain any stay of proceedings, (other than by arrest of judgment or writ of error,) in any suit for a monopoly, is likewise made a *præmunire* by statute 21 Jac. I. c. 3 (*s*).] 3. To attempt to restrain the importation or making of gunpowder, is also a *præmunire* by 16 Car. I. c. 21 (*t*). 4. On the abolition, by statute 12 Car. II. c. 24, of purveyance(*u*), and the prerogative of pre-emption,—or taking any victual, beasts or goods for the king's use at a stated price without the consent of the proprietor,—the exertion of any such power for the future was declared to be indictable; and in any suit thereon, to obtain any stay of proceedings other than by arrest of judgment, or writ of error, is made a *præmunire*. 5. [To assert maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without

(*r*) By 11 & 12 Vict. c. 108, reciting that doubts existed whether her Majesty could lawfully establish diplomatic relations and intercourse with the sovereign of the Roman states,—it was declared and enacted, that such relations and intercourse should be lawful; but with a proviso prohibitory of the reception at the Court of London of any diplomatic agent from Rome who shall be in holy orders in the Church of Rome,

or a Jesuit, or member of any order of the Church of Rome bound by monastic or religious vows.

(*s*) Vide sup. vol. 11. p. 25.

(*t*) Blackstone also cites (vol. iv. p. 116) the Act in reference to the importation of gunpowder, 1 Jac. 2, c. 8; but this last was repealed by 6 Geo. 4, c. 105.

(*u*) As to purveyance and pre-emption, vide sup. vol. 11. p. 556.

[the king, is declared a *præmunire* by statute 13 Car. II. c. 1 (v). 6. By the Habeas Corpus Act also, 31 Car. II. c. 2, it is a *præmunire*, and incapable of the king's pardon, besides other heavy penalties, to send any subject of this realm a prisoner,] subject to certain exceptions in the Act specified, [into parts beyond the seas. 7. By statute 7 & 8 Will. III. c. 24, serjeants, counsellors, proctors, attorneys, and all officers of courts practising without having taken the oaths of allegiance and supremacy (x), are guilty of a *præmunire*. 8. By the statute 6 Ann. c. 7, to assert maliciously and directly, by preaching, teaching or advised speaking, that any person, other than according to the Acts of Settlement and Union, hath any right to the throne of these kingdoms, or that the king and parliament cannot make laws to limit the descent of the Crown, such preaching, teaching or advised speaking is a *præmunire*: as writing, printing or publishing the same doctrines amounted, we may remember, to treason (y). 9. By statute 6 Ann. c. 23, if the assembly of peers of Scotland, convened to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *præmunire*. 10. The statute 12 Geo. III. c. 11, subjects to the penalties of the statute of *præmunire*, all such as knowingly, and wilfully, solemnize, assist, or are present, at any forbidden marriage of such of the descendants of the body of King George the second, as are, by that Act, prohibited to contract matrimony without the consent of the Crown (z).

Having thus inquired into the nature and several species

(v) Vide sup. vol. II. p. 350.

(x) Vide sup. vol. II. pp. 415, 416.

(y) Vide sup. pp. 245, 246.

(z) Vide sup. vol. II. p. 472.

Besides the instances of offences subject to the penalties of a *præmunire* mentioned in the text, three others are enumerated by Blackstone, viz., 1. The offence under 13 Eliz. c. 8, of acting as a broker

or agent, in any usurious contract where above ten per cent. is taken.

2. The offence under 1 W. & M. st. 1, c. 8, of refusing, (where the party is eighteen years of age,) to take, upon proper tender, the oaths of allegiance and supremacy. 3. The offence under 6 Geo. 1, c. 18, (commonly called the Bubble Act,) of undertaking unwarrantable projects

[of *præmunire*, its punishment may be gathered from the foregoing statutes, which are thus shortly summed up by Sir Edward Coke (a), “That from the conviction the defendant shall be out of the king’s protection, and his lands and tenements, goods and chattels, forfeited to the king; and that his body shall remain in prison *at the king’s pleasure*; or, as other authorities have it, *during life*” (b): both which amount to the same thing, as the king by his prerogative may any time remit the whole or any part of the punishment; except in the case of transgressing the statute of *habeas corpus*.

These forfeitures here inflicted, do not bring this offence within our former definition of felony; being inflicted by particular statutes, and not by the common law. But so odious, Sir Edward Coke adds, was this offence of *præmunire*, that a man that was attainted of the same might have been slain by any other man without danger of law; because it was provided by law that any man might do to him as to the king’s enemy, and any man may lawfully kill an enemy (c). However, the position itself that it is at any time lawful to kill an enemy, is by no means tenable; it is only lawful by the law of nature and nations to kill him in the heat of battle, or for necessary self-defence. And to obviate such savage or mistaken notions the statute 5 Eliz. c. 1, s. 21, provided, that it shall not be lawful to kill any person attainted in a *præmunire*; any law, statute, opinion, or exposition of law, to the contrary notwithstanding (d). But still such delinquent, though protected, as a part of the public, from public wrongs, can bring no action for any private injury, how atrocious soever; being so far out of the protection of the law, that

by unlawful subscriptions. But the law on these subjects is now altered. See as to the first, 17 & 18 Vict. c. 90; as to the second, 31 Geo. 3, c. 32, s. 18; and 7 & 8 Vict. c. 102; as to the third, 6 Geo. 4, c. 91.

(a) 1 Inst. 129.

(b) 1 Bulst. 199.

(c) Stat. 25 Edw. 3, st. 5, c. 22.

(d) The Act in which this declaration of the law is contained, relates chiefly to other subjects, and is among those repealed by 9 & 10 Vict. c. 59, as to which vide sup. vol. III. p. 64.

[it will not guard his civil rights, nor remedy any grievance which he as an individual may suffer. And no man knowing him to be guilty, can with safety give him comfort, aid or relief (e).]

VII. [*Contempts against the sovereign's title*, not amounting to treason or *præmunire*, are chiefly the denial of his right to the Crown, in common and unadvised discourse; for if it be by advisedly speaking, we have seen that it amounts to *præmunire* (f). This heedless species of contempt, is punished by our law with fine and imprisonment.]

VIII. *Contempts against the Crown's ecclesiastical supremacy*; of which we have had an example in the strange attempt lately made by the see of Rome to establish a hierarchy of its own within this realm, with titles invasive of the rights of our protestant dignitaries. Our law, however, has made provision against all contempts of this description. For, first, it is enacted by 10 Geo. IV. c. 7, s. 24, that if any person, other than the person authorized by law, shall assume or use the title of archbishop of any province, bishop of any bishopric, or dean of any deanery, in England or Ireland,—he shall forfeit for every such offence 100*l*. And by 14 & 15 Vict. c. 60, a like penalty is imposed upon any person who shall procure from the see of Rome, or publish or put in use within the united kingdom, any bull for constituting archbishops or bishops of pretended provinces or sees; or upon any person other than the person authorized by law, who shall assume or use the title of archbishop, bishop, or dean of any city, town, place, or territory in the united kingdom,—whether it be the city, town, place, or territory of any province, see, or deanery of the united kingdom or not.

IX. *Contempts against the royal palaces* [have been always looked upon as high misprisions; and by the antient law before the Conquest, fighting in the king's palace or

(e) Hawk. P. C. b. 1, c. 19, s. 47.

(f) Vide *sup.* p. 267.

[before the king's judges was punished with death (*g*). So too, in the old Gothic constitution, there were many places privileged by law—"quibus major reverentia et securitas debetur, ut templa et judicia, quæ sancta habebantur, arces et aula regis, denique locus quilibet præsentē aut adventante rege (*h*)."] And with us, by the statute 33 Hen. VIII. c. 12, malicious striking in the king's palace wherein his royal person resides, whereby blood is drawn, was punishable by perpetual imprisonment and fine at the king's pleasure, and also with the loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length (*i*); but by 9 Geo. IV. c. 31, s. 1, the part of this Act which inflicted the above punishment, is repealed. It appears, however, to be a contempt of the kind now in question to execute the ordinary process of the law, by arrest or otherwise, within the verge of a royal palace, or in the Tower; unless permission be first obtained, from the proper authority (*k*).

X. The maladministration of such high officers as are in public trust and employment, is ranked by Blackstone among contempts against the sovereign or his government. [This is usually punished by the method of parliamentary impeachment; wherein such penalties short of death are inflicted, as to the wisdom of the house of Lords shall seem proper; consisting usually of banishment, imprisonment, fines or perpetual disability. Hitherto also may be referred the offence of *embezzling of public money*, called among the Romans *peculatus*; which the Julian law punished with death in a magistrate, and with deportation or banishment in a private person (*l*). With us it is not a capital crime; but subjects the committer of it, at common law, to a dis-

(*g*) 3 Inst. 140; LL. Alured. cap. 7 and 34.

(*h*) Stiernh. de Jure Goth. l. 3, c. 3.

(*i*) See Knevet's case, 11 Harg. St. Tr. 16.

(*k*) See Eldefton's case, Ld. Raym.

978; R. v. Stobbs, 3 T. R. 735; Winter v. Miles, 1 Camp. 475; S. C. 10 East, 578; Sparks v. Spink, 7 Taunt. 311; Batson v. M'Lean, 2 Chit. Rep. 51; Bell v. Jacobs, 1 M. & P. 309.

(*l*) Inst. lib. 4, tit. 18, par. 9.

[cretionary fine and imprisonment.] And by statute 50 Geo. III. c. 59, s. 2, it is now provided, that if any officer entrusted with the receipt or management of the public revenues, shall knowingly furnish false statements or returns of the monies collected by him, or the balances left in his hands, he shall be guilty of a misdemeanor; and be fined and imprisoned at the discretion of the court, and for ever rendered incapable of holding any office under the Crown. And we have seen that special provisions are in force with regard to the *stealing* or *embezzlement* by persons, in the service of the Crown, of any chattel, money or valuable security in their possession, or coming under their control, by virtue of their employment (*m*).

XI. To the same class of offences, must be referred that of *selling public offices*; as to which it is provided by 5 & 6 Edw. VI. c. 16, (confirmed and extended by 49 Geo. III. c. 126,) that persons buying or selling, or receiving or paying money or reward for, any office in the gift of the Crown (with certain exceptions); and persons receiving or paying money for, or soliciting or obtaining, any such office, or making any negotiation or pretended negotiation relating thereto; and persons opening or advertising houses for transacting business relating to the sale of any such office;—shall, respectively, be deemed guilty of a misdemeanor (*n*).

XII. *Offences relating to the coin.*

And, first, of offences relating to the coin of *this* realm. These are now comprised in the stat. 24 & 25 Vict. c. 99, (intituled “An Act to consolidate and amend the Statute Law of the United Kingdom against Offences relating to the Coin”); which repeals, as far as the united kingdom

(*m*) 24 & 25 Vict. c. 96, ss. 69, 70. Vide sup. pp. 213, 214.

(*n*) As to this statute, see *Hopkins v. Prescott*, 4 C. B. 578; *Serry v. Clifton*, 9 C. B. 110. See also 6 Geo. 4, cc. 82 and 83, by which the

sale of offices in the Queen's Bench and Common Pleas are prohibited; and see 17 & 18 Vict. c. 102, as to election *bribery*, by gift of any office.

is concerned (*p*), the 2 & 3 Will. IV. c. 34, by which this subject was previously regulated; and which itself swept away a great variety of enactments relating to the coin, by which our criminal code was previously encumbered. The existing provisions are as follow:—

With respect to gold and silver coin.

1. Whosoever shall falsely make or counterfeit any coin, resembling, or apparently intended to resemble or pass for, any of the queen's current gold or silver coin, shall be guilty of felony (*q*).

2. Whosoever shall gild or silver, (or colour with any wash or materials capable of producing the colour of gold or silver, or by any means whatsoever,) any coin, resembling or intended to pass for any current gold or silver coin; or any piece of silver or copper, or of coarse gold or silver, or of any metal or mixture of metals (of a fit size and figure to be coined),—with intent that the same shall be coined into false coin, resembling, or intended to pass for, any current gold or silver coin; or who shall gild, silver, or colour any of the current silver coin or copper coin (or file or alter such silver or copper coin),—with intent to make the same resemble or pass for any of the current gold coin or silver coin,—shall, in any of the above cases, be guilty of felony (*r*).

3. Whosoever, without lawful authority or excuse, (the proof whereof shall lie on the party accused,) shall buy, sell, receive, pay, or put off any false gold or silver coin, at a lower rate than the same by its denomination imports; or shall import into the united kingdom any such false coin, knowing the same to be counterfeit; he shall, in either case, be guilty of felony (*s*). •

(*p*) In certain of the *colonies*, however, the 2 & 3 Will. 4, c. 34, remains still in force, its provisions having been, by 16 & 17 Vict. c. 48, extended to those colonies in which local provisions, with respect to offences, relating to the coin of this

realm, have not been made. †

(*q*) 24 & 25 Vict. c. 99, s. 2.

(*r*) Sect. 3. See *R. v. Turner*, 2 M. C. C. R. 42.

(*s*) *Ibid.* ss. 6, 7. See *R. v. Joyce*, Car. C. L. 194. •

4. Whosoever, without lawful authority or excuse, (the proof whereof shall lie on the party accused,) shall knowingly make or mend, or buy or sell, or have in his custody or possession, or shall convey out of the Royal Mints, any coining moulds, machines, or tools,—or shall convey out of such Mints any coin, bullion, metal, or mixture of metals,—shall, in any of such cases, be guilty of felony (*s*).

The punishment for any of the felonies hitherto mentioned, is penal servitude for life, or for any term not less than three years; or imprisonment for any term not more than two years, with or without hard labour and solitary confinement (*t*).

5. Whosoever shall impair, diminish, or lighten any of the current gold or silver coin, with intent that the coin so altered may pass for the current gold or silver coin, shall be guilty of felony, and is liable to penal servitude for any term not less than three years, or more than fourteen years, or may be imprisoned as already specified (*u*).

6. Whosoever shall unlawfully and knowingly have in his custody or possession any filings, clippings, bullion dust or solution, produced or obtained by impairing, diminishing or lightening the current gold or silver coin, shall be guilty of felony, and punished by imprisonment as already specified, or by penal servitude for not less than three years, or more than seven years (*v*).

7. Whosoever shall tender, utter, or put off any false or counterfeit gold or silver coin, knowing the same to be false or counterfeit, shall be guilty of a misdemeanor; and may be imprisoned for any term not exceeding one year,

(*s*) 24 & 25 Vict. c. 99, ss. 24, 25.
See *R. v. Foster*, 7 Car. & P. 495;
R. v. Bannen, 1 Car. & Kir. 295.

(*t*) In the case of any felony under this Act, the court may, if it shall think fit, bind over the offender with sureties to keep the peace, in addition to any other punishment (sect. 38). Until the passing of 2

Will. 4, c. 34, many offences connected with counterfeiting coin were *capital felonies*; and, in the time of Blackstone, to counterfeit the king's money, or bring false money into the realm, was *treason* (4 Bl. Com. p. 84).

(*u*) 24 & 25 Vict. c. 99, s. 4.

(*v*) *Ibid.* s. 5.

with or without hard labour and solitary confinement (*x*): and if at the time of such uttering he have in his possession any other such counterfeit coin; or shall either on the day of such uttering, or within ten days afterwards, utter any more such false coins (knowing the same to be false);—the imprisonment may be for any term not exceeding two years (*y*): and if any person shall have in his possession three or more pieces of such counterfeit gold or silver coin, knowing the same to be counterfeit, and with intent to utter the same, he may be sentenced to penal servitude for three years, or imprisonment not exceeding two years (*z*). And upon a second conviction for any of these misdemeanors, he shall be deemed guilty of felony, and may be punished by penal servitude for life, or not less than three years; though a discretionary power is here also reserved to the court, to substitute imprisonment to the extent and manner already specified (*a*).

8. And whosoever shall, with intent to defraud, tender, utter or put off, as for current gold or silver coin, any coin not being such current coin, or any medal or piece of metal resembling the current coin for which the same shall be tendered, being of less value than the same,—shall be guilty of a misdemeanor, punishable with imprisonment, with or without hard labour and solitary confinement, to the extent of one year (*b*).

With respect to copper coin (c).

1. If any person shall falsely make or counterfeit any

(*x*) 24 & 25 Vict. c. 99, s. 9. In the case of any indictable misdemeanor under this Act, the court, in addition to, or in lieu of, any other punishment, may fine the offender, and bind him over with sureties to keep the peace and for good behaviour (sect. 38).

(*y*) 24 & 25 Vict. c. 99, s. 10.

(*z*) Sect. 11. As to the offence of uttering, &c. counterfeit coin, see *R. v. Heath*, R. & R. C. C. 184; *R. v. Stewart*, *ibid.* 288; *R. v.*

Williams, 1 Car. & M. 259; *R. v. Hurse*, 2 M. & R. 360; *R. v. Rogers*, 2 Moo. C. C. 85; *R. v. Foster*, 1 Dearsley's O.S.C. R. 456; *Jarvis's case*, *ibid.* 552.

(*a*) 24 & 25 Vict. c. 99, s. 12.

(*b*) *Ibid.* s. 13.

(*c*) These provisions equally apply to the coins recently issued, which are composed of *brass* or *mixed metal*. (See 22 & 23 Vict. c. 30; 24 & 25 Vict. c. 99, s. 1.)

coin resembling any of the current copper coin; or shall, (without lawful authority or excuse,) make or mend, or begin to make or mend, buy or sell, or have in his custody or possession, any instrument, tool or engine adapted for counterfeiting the current copper coin; or shall buy, receive, pay, or put off any false coin resembling any of the current copper coin, at a lower rate than its denomination imports, or was apparently intended to import;—he shall, in any of these cases, be guilty of felony; and may be sentenced to penal servitude for any term not more than seven or less than three years, or be imprisoned for any term not more than two years, with or without hard labour and solitary confinement (*d*).

2. Whosoever shall utter or put off any false coin intended to pass for any current copper coin; or shall have in his possession three or more pieces of false copper coin; knowing the same to be counterfeit, and with intent to utter the same,—shall be guilty of a misdemeanor, and may be so imprisoned for any term not exceeding one year (*e*).

In addition to the above provisions, it is also enacted, that it shall be a misdemeanor, punishable by imprisonment, with or without hard labour, to the extent of two years, for any person (without lawful authority) to *export* any false or counterfeit coin (*f*); and a misdemeanor so punishable to the extent of one year, for any person to *deface* any of the Queen's current coin by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened. And it is declared that coin, so defaced or stamped, shall not be a legal tender; and that any person tendering or uttering it, may be summarily convicted before two justices, and fined forty shillings (*g*).

(*d*) 24 & 25 Vict. c. 99, s. 14.

(*e*) Sect. 15.

(*f*) Sect. 8.

(*g*) Ibid. ss. 16, 17. It was formerly an offence to melt down the current gold and silver coin of the

Secondly, of offences relating to the *coin of foreign states*.

Whosoever shall make or counterfeit any kind of coin not the *queen's* current gold or silver, but resembling, or apparently intended to resemble or pass for gold or silver coin of any foreign state; or shall (without lawful authority or excuse) bring into the united kingdom any such false coin, knowing the same to be counterfeit;—shall be guilty of felony: and he may be sentenced to penal servitude for any term not more than seven or less than three years; or imprisonment, with or without hard labour and solitary confinement, to the extent of two years (*g*). And it is further enacted, that if any person shall tender, utter or put off, any such counterfeit foreign coin, knowing the same to be false, he shall be guilty of a misdemeanor, and may for the first offence be imprisoned to the extent of six months (with or without hard labour); for the second offence be imprisoned for two years, (with the addition, if thought fit, of solitary confinement;) and for the third offence, shall be deemed guilty of felony, and may be sentenced to penal servitude for life, or not less than three years; or to be imprisoned for not more than two years, with or without hard labour, and solitary confinement (*h*).

And whosoever shall counterfeit any foreign coin, intended to resemble any foreign *copper* or other coin made of metals or mixed metals of less value than silver,—shall be guilty of a misdemeanor; and may be imprisoned for the first offence for any time not exceeding one year: and on a second conviction, he is liable to penal servi-

realm; to receive or pay for current gold coin for more or less value than its denomination imported; and to import into this country silver coin below the standard weight. But the statutes that constituted these offences were repealed by 59 Geo. 3, c. 49, s. 11; 6 Geo. 4, c. 105, s. 141; and 2 Will. 4,

c. 34.

(*g*) 24 & 25 Vict. c. 99, ss. 18, 19. These provisions are in the place of similar ones contained in 37 Geo. 3, c. 126 (repealed by 24 & 25 Vict. c. 95), as to which see R. v. Roberts, 1 Dearsley's C. C. 339.

(*h*) Ibid. ss. 20, 21.

tude for not more than seven or less than three years; or imprisonment, (with or without hard labour and solitary confinement,) not exceeding two years (*i*). And whosoever shall have in his possession more than five pieces of *any* false foreign coin (without lawful excuse), may be convicted before a justice in the penalty of not more than forty shillings, or less than ten shillings, for every piece of such false coin found in his possession; and in default thereof be committed to the house of correction for three months, or till the fine be paid. And all such base money is forfeited and shall be destroyed by the authorities (*k*).

XIII. Offences in relation to the *royal naval or military stores, ships, &c.* Such offences in relation to the royal stores, as amount to larceny or embezzlement, are punishable according to the distinctions already explained with regard to those crimes (*l*). But besides these, there are others of a lighter description, to repress which, various enactments formerly existed, which have been recently consolidated into a single statute. This is the 25 & 26 Vict. c. 64, which, among other provisions, enacts, 1. That any person (other than the admiralty, their contractors, officers or workmen), who shall apply in or on any naval or victualing stores, the *broad arrow*, or any other royal mark specified in the schedule to that Act,—or shall receive, keep or sell the same, knowing them to be so marked,—shall be guilty of a *misdemeanor*, and liable to imprisonment for not more than one year, with or without hard labour (*m*). 2. That any person, who, with intent to conceal her majesty's property in such stores, shall take out or obliterate any such marks,—shall be guilty of *felony*, and liable to such imprisonment, for not more than two

(*i*) 24 & 25 Vict. c. 99, s. 22.

(*k*) Sect. 23.

(*l*) Vide sup. pp. 213, 214. It may be remarked, that these crimes, when committed by persons subject to the *articles of war*, are specially

provided against in the annual Mutiny Acts, and in the Act for the government of the navy (as to which vide sup. vol. II. pp. 612, 618).

(*m*) 25 & 26 Vict. c. 64, ss. 5, 7.

years (*m*). And 3. That any person brought before two or more justices at petty sessions, charged with having or conveying any of such stores stolen or unlawfully obtained, or reasonably suspected so to have been, if he does not give a satisfactory account how he came by such stores,—shall be deemed guilty of a misdemeanor, and liable on summary conviction to a penalty not exceeding 5*l.*, or to *two months'* imprisonment, with or without hard labour; and if it appear that he had reasonable cause for believing them to have been stolen or unlawfully obtained, shall be liable to such penalty, or such imprisonment to the extent of *three months*.

It is also provided by 12 Geo. III. c. 24, that to *set on fire, burn or destroy* any of her majesty's ships of war (*n*), (whether built, building or repairing,) or any of the arsenals, magazines, dockyards, ropecyards, or victualling offices of the Crown, or materials thereto belonging, or any military, naval or victualling stores or ammunition; or to aid, procure, abet or assist in any of such offences, —is felony, punishable with *death*.

XIV. The offence of *serving foreign states*, [which service is generally inconsistent with allegiance to one's natural prince,] is now restrained and punishable by the statute 59 Geo. III. c. 69,—generally known by the name of the “Foreign Enlistment Act” (*o*),—which provides

(*m*) By this Act the following Acts are either in part or wholly repealed, 9 & 10 Will. 3, c. 41; 9 Geo. 1, c. 8; 17 Geo. 2, c. 40; 39 & 40 Geo. 3, c. 89; 54 Geo. 3, c. 60; 54 Geo. 3, c. 159; 55 Geo. 3, c. 127; 56 Geo. 3, c. 80; 4 Geo. 4, c. 53; 2 & 3 Will. 4, c. 40.

(*n*) As to the offence of firing, &c., ships generally, vide sup. pp. 187, 224.

(*o*) As to this Act (which repeals certain enactments on the same subject, passed in the reign of Geo. II.),

see *Dobree v. Napier*, 2 Bing. N. C. 781. By an Act, 3 Jac. 1, c. 4 (repealed by 9 & 10 Vict. c. 59), it was *felony* for any person whatever to go out of the realm to serve any foreign prince without having first taken the oath of allegiance before his departure; and (if a gentleman or person of higher degree, or an officer in the army), without having also previously entered into a bond not to enter into a conspiracy against his natural sovereign.

that if any natural-born subject (without licence previously obtained under the royal sign-manual, or signified by order in council or proclamation) shall accept any military commission (*p*); or enlist as a soldier or a sailor in any foreign service; or shall go to any foreign country with an intent so to enlist; or shall endeavour to procure any other person so to enlist;—he shall, in any of the above cases, be guilty of a misdemeanor, and may be punished with fine or imprisonment, or both. And that if any person within the united kingdom, or in any dominions of the crown beyond the seas, (without leave of the crown first obtained,) shall fit out or arm any vessel for the service of any foreign state, or shall issue any commission for any such vessel, or shall increase the number of guns or equipment for war of such vessel, or be concerned in augmenting the warlike force of any foreign armed vessel arriving in this country;—such offender shall also be guilty of a misdemeanor, and may be punished in the same manner.

Moreover, any ship having on board such persons, so illegally enlisted, may be prevented from proceeding on her voyage; and the master thereof, if he shall have knowingly received such persons on board, may be fined in the penalty of 50*l.* for every such person respectively.

XV. The offences of *desertion* or *seducing to desert*, from the army or navy (*q*).

These offences are now provided against by the annual Mutiny Acts, and by the Act for the better government of the Navy (*r*); by which they are placed under the jurisdiction of courts-martial, and punished with such punishment as those courts shall inflict (*s*).

(*p*) As to the offence of receiving a *pension* from a foreign prince, vide post, p. 283.

(*q*) As to seamen or apprentices deserting from the *merchant service*, see 17 & 18 Vict. c. 104, s. 243.

(*r*) There are also the statutes

18 Hen. 6, c. 19; 5 Eliz. c. 5; and 2 & 3 Edw. 6, c. 2; but these are obsolete; (see Russ. on Crimes, vol. i. p. 93.)

(*s*) Vide sup. vol. II. pp. 613, 618, n. (*h*).

The offence of a civilian seducing soldiers to desert, is also punishable by 1 Geo. I. c. 47; which enacts, that if any person, not himself enlisted, shall attempt to persuade any soldier to desert or leave the service, he shall forfeit 40*l.*, to be recovered in one of the superior courts of law; and may also, at the discretion of the court, be imprisoned for any term not more than six months.

And, by 37 Geo. III. c. 70 (*s*), any person maliciously endeavouring to seduce any person, serving in the Royal forces by sea or land, from their allegiance; or stirring up any such persons to mutiny or to any traitorous or mutinous practice;—is made guilty of felony. Under this Act he was punishable with *death*; but by the effect of later statutes, he is now liable, if convicted under its provisions, to penal servitude for life, or any term not less than three years; or to be imprisoned, with or without hard labour or solitary confinement, for any term not more than two years (*t*).

XVI. It may be also said to be an offence against the royal title and government, *to refuse or neglect to take the oath* which has been recently substituted for the oaths of allegiance, supremacy, and abjuration, within such period as the law requires after admission to any office. But of this we had occasion to speak in a former part of the work; and it will be therefore unnecessary to resume the subject (*u*).

XVII. Another offence against the government, is that of administering *unlawful oaths*; or being engaged in *illegal societies*.

It is enacted by 37 Geo. III. c. 123, that whoever shall administer or cause to be administered, or shall be present at and consenting to the administering of,—or shall him-

(*s*) Made perpetual by 57 Geo. 3, 20 & 21 Vict. c. 3.
 c. 7.
 (†) 7 Will. 4 & 1 Vict. c. 91; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99;
 (*u*) Vide sup. vol. II. p. 643; and vol. III. p. 57.

self take,—any oath or engagement intended to bind any person in any mutinous or seditious purpose; or to belong to any seditious society or confederacy; or to obey any committee, or any person not having legal authority for that purpose; or not to give evidence against any confederate or other person; or not to discover any unlawful combination, or any illegal act, or any illegal oath or engagement,—shall be guilty of felony; and he may be sentenced to penal servitude for not more than seven or less than three years (*v*).

And further, that compulsion shall be no excuse, unless the party, within four days after he has an opportunity, shall disclose the whole of the case to a justice of the peace; or, if the party compelled be a soldier or seaman, to his commanding officer.

Moreover, by 39 Geo. III. c. 79; 52 Geo. III. c. 104; 57 Geo. III. c. 19; and 2 & 3 Vict. c. 12;—all societies of which the members shall take such oaths or engagements as are prohibited by 37 Geo. III. c. 123, or for the commission of treason, murder, or capital felony, or any oath or engagement not required by law; all societies of which the members shall subscribe any unauthorized test or declaration; and all societies which shall comprise members the names whereof shall be unknown to the society at large, or which shall consist of different branches, which shall elect committees or delegates to communicate with other societies,—are to be deemed *unlawful combinations*: and persons becoming members thereof, or or aiding, abetting, or supporting the same, may be either proceeded against in a summary way before one justice or more, who may fine 20*l*., or imprison for three calendar months (*x*); or they may be prosecuted by indictment, and sentenced to penal servitude for not more than seven

(*v*) 37 Geo. 3, c. 123, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*x*) By 51 Geo. 3, c. 65, s. 2, the 20*l*. fine may be mitigated to any sum not less than 5*l*. As to pro-

ceedings under these Acts, (which must be in the name of the Crown, by the attorney or solicitor general,) see 2 & 3 Vict. c. 12; 9 & 10 Vict. c. 33.

or less than three years, or imprisoned for any time not exceeding two years(*y*). When the objects of the society, however, are not mutinous, seditious, treasonable, or felonious, these provisions are subject to exception;—as in the case of regular lodges of Freemasons, societies duly established under the statutes in force relating to friendly societies(*z*), meetings of Quakers, and meetings of a religious or charitable nature only: and such as relate to oaths and engagements do not extend to any form of declaration approved by two justices, and registered as in the Acts provided.

By one of the above Acts, viz. by 52 Geo. III. c. 104, it is also provided that every person who shall administer or cause to be administered, or be aiding or assisting in the administration of, any oath or engagement intending to bind the party sworn to the commission of any *treason*, *murder* or *capital felony*,—shall be guilty of felony; and he may be sentenced to penal servitude for life, or for not less than three years, or be imprisoned, with or without hard labour and solitary confinement, for any term not more than two years(*u*). And it is further enacted, that every person taking such oath or engagement, (not being compelled,) shall be guilty of felony, and liable to penal servitude for life, or such time as the court may direct; and that compulsion shall be no excuse, unless the party compelled makes discovery of the case within fourteen days(*b*).

Lastly, by 60 Geo. III. & 1 Geo. IV. c. 1, all meetings and assemblies of persons for the purpose of being trained, or of practising military exercise, without lawful authority, are prohibited(*c*). Persons attending such

(*y*) 39 Geo. 3, c. 79; 52 Geo. 3, c. 104; *57 Geo. 3, c. 19; 2 & 3 Vict. c. 12; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*z*) See as to these, sup. vol. III. p. 208.

(*u*) 52 Geo. 3, c. 104; 7 Will. 4 & 1 Vict. c. 91; 9 & 10 Vict. c. 24, s. 1;

16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*b*) 52 Geo. 3, c. 104, ss. 1, 2.

(*c*) As to our *volunteers*, they are trained (as elsewhere explained) under the provisions of 44 Geo. 3, c. 44 (vide sup. vol. II. p. 610).

meetings, for the purpose of training others, are made liable to penal servitude for three years, or to be imprisoned for two years (*d*); and those attending for the purpose of being trained, may be fined and imprisoned for two years (*e*).

XVIII. We shall conclude the chapter with a notice of certain *miscellaneous contempts* against the royal prerogative, not properly falling under any of the preceding heads. Such as, 1. Concealing treasure trove, which, (as we have elsewhere explained,) [belongs to the sovereign or his grantees by prerogative royal (*f*);] and the concealment of which was formerly punishable by death (*g*), but now only by fine and imprisonment (*h*). 2. [Preferring the interests of a foreign potentate to those of our own, or doing or receiving anything that may create an undue influence in favour of such extrinsic power; as by taking a pension from any foreign prince without the consent of the Crown (*i*).] 3. [Disobeying the sovereign's lawful commands;—whether by writs issuing out of his courts of justice; or by a summons to attend his privy council; or by letter from him to a subject, commanding him to return from beyond the seas, (for disobedience to which, his lands shall be seized till he does return, and himself afterwards punished); or by the writ of *ne exeat regno*, or proclamation commanding the subject to stay at home (*h*).] 4. [Disobedience to any Act of parliament, where no particular penalty is assigned.] All these are instances of misprisions and contempts; and all are punishable by fine and imprisonment at the discretion of the courts of justice (*l*).

(*d*) 60 Geo. 3 & 1 Geo. 4, c. 1;
16 & 17 Vict. c. 99; 20 & 21 Vict.
c. 3.

(*e*) 60 Geo. 3 & 1 Geo. 4, c. 1.

(*f*) Vide sup. vol. II. p. 558.

(*g*) Glanv. l. 1, c. 2.

(*h*) 3 Inst. 133.

(*i*) 3 Inst. 144.

(*k*) Vide sup. vol. II. p. 524; sup.
p. 52.

(*l*) Hawk. P. C. b. 1, c. 22, s. 5.

CHAPTER VII.

OF OFFENCES AGAINST RELIGION.

It has been laid down at the outset of this work that *rights* are liberties secured to the individual by the compact of civil society (*a*); and at the beginning of the present Book we have defined *crimes* as the violation of rights when considered in a particular point of view, viz. in reference to the evil effect of such violation as regards the community at large (*b*). It follows from this, that crimes, in contemplation of law, essentially consist in the breach of human institutions; and therefore, though the offences in this and the following chapter are enumerated as offences against religion and the law of nations, which are equivalent to the law of God and the law of nature; yet in a treatise of municipal law, we must consider them as deriving their particular guilt from the law of man.

Of offences against religion, of which cognizance is thus taken by human tribunals, the first is that of—

I. [*Apostasy*, or a total renunciation of Christianity, by embracing either a false religion or no religion at all. This offence can only take place, in such as have once professed the true religion. The perversion of a Christian to judaism, paganism, or other false religion, was punished by the Emperors Constantius and Julian with confiscation of goods (*c*): to which the Emperors Theodosius and Valentinian added capital punishment, in case the apostate en-

(*a*) Vide sup. vol. i. p. 30.

(*c*) Cod. l. 7, 1.

(*b*) Vide sup. p. 89.

[deavoured to pervert others to the same iniquity (*d*): a punishment too severe for any temporal laws to inflict upon any spiritual offence: and yet the zeal of our ancestors imported it into this country; for we find by Bracton, that in his time apostates were to be burnt to death (*e*). Doubtless the preservation of Christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state; which a single instance sufficiently will demonstrate.

The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the Supreme Being, and a firm persuasion that he superintends and will finally compensate every action in human life,—all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our Lord and Saviour Christ,—these are the grand foundation of all judicial oaths; which call God to witness the truth of those facts which, perhaps, may be only known to Him and the party attesting: all moral evidence, therefore, all confidence in human veracity, must be weakened by apostasy and overthrown by total infidelity (*f*). Wherefore all affronts to Christianity, or endeavours to depreciate its efficacy in those who have once professed it, are highly deserving of censure. But yet the loss of life is a heavier penalty than the offence, taken in a civil light, deserves; and taken in a spiritual light, our laws have no jurisdiction over it. This punishment, therefore, has long ago become obsolete; and the offence of apostasy was for a long time the object only of the ecclesiastical courts, which corrected the offender *pro salute animæ*. But about the close of the sixteenth century the civil liberties to which we were then restored, being used as a cloak of maliciousness; and

(*d*) Cod. 6.

(*e*) L. 3, c. 9.

(*f*) "*Utiles esse opiniones has, quis neget, cum intelligat, quam multa firmentur jurejurando; quantæ salutis sint foederum religiones; quam multos*

divini supplicii metus a scelere revocarit; quamque sancta sit societas civium inter ipsos, Diis immortalibus interpositis tum iudicibus, tum testibus?"—Cic. de LL. ii. 7.

[the most horrid doctrines subversive of all religion, being publicly avowed, both in discourse and writings; it was thought necessary again for the civil power to interpose, by not admitting those *miscreants* to the privileges of society, who maintained such principles as destroyed all moral obligation (*g*).] To this end it was enacted by stat. 9 & 10 Will. III. c. 32, that if any person educated in, or having made profession of, the Christian religion, shall by writing, printing, teaching, or advised speaking, assert or maintain there are more Gods than one, or shall deny the Christian religion to be true (*h*), or the Holy Scripture of the Old and New Testament to be of divine authority, [he shall upon the first offence be rendered incapable to hold any] ecclesiastical, civil or military office or employment, and, [for the second, be rendered incapable of bringing any action, (or to be guardian, executor, legatee, or grantee,) and shall suffer three years' imprisonment without bail. To give room, however, for repentance;—if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.

II. A second offence is that of *heresy*; which consists not in a total denial of Christianity, but of some of its principal doctrines, publicly and obstinately avowed (*i*).] But of this offence, (now subject only to ecclesiastical correction *pro salute animæ*, and no longer punishable by the secular law,) enough has been said in that part of the work which relates to the Church and its doctrines (*j*).

III. Another species of offences against God and religion, [is that of *blasphemy* against the Almighty by denying

(*g*) *Miscreoyantz* in our antient law books is the name of unbelievers.

(*h*) The Act adds to these offences, that of denying “any one of the persons in the Holy Trinity to be God,”

but it was repealed *quoad hoc*, by 53 Geo. 3, c. 160. (See *Rex v. Waddington*, 1 Barn. & Cres. 26.)

(*i*) 1 Hale, P. C. 384.

(*j*) Vide sup. vol. III. pp. 48, 53.

[His being or providence; or by contumelious reproaches of our Lord and Saviour Christ: whither, also, may be referred all profane scoffing at the Holy Scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment (*k*). For Christianity is part of the laws of England (*l*);] and a blasphemous libel may be prosecuted as an offence at common law; and punished with fine and imprisonment (*m*).

IV. A fourth species of offences against religion are those which affect the Established Church. And these are said by Blackstone [to be either positive or negative: positive, by reviling its ordinances; or negative, by non-conformity to its worship (*n*).] But we shall confine our remarks to the former class: the latter being now nearly reduced to a mere name by the effect of the many modern Acts, passed for the extension of the principle of religious toleration; the history of which has been already traced, in that part of this work where we had occasion to consider the Church and its worship (*o*).

As to the offence of *reviling the ordinances of the Church*. [This is a crime of a much grosser nature than the other of mere non-conformity; since it carries with it the utmost indecency, arrogance, and ingratitude: indecency, by setting up private judgment in virulent and factious opposition to public authority; arrogance, by treating with contempt and rudeness, what has at least a better chance to be right than the singular notions of any particular man; and ingratitude, by denying that indulgence and

(*k*) Hawk. P. C. b. 1, c. 5, s. 5.

(*l*) 1 Vent. 293; R. v. Woolston, Str. 834; Hawk. P. C. b. 1, c. 5, s. 6. In the thirty-fourth year of Henry the sixth, Chief Justice Prisot declared in the Court of Common Pleas,—“*Scripture est common ley, sur quel tous manieres de leis sont*

fondés.” See the Year Book, 34 Hen. 6, 40.—Ch.

(*m*) R. v. Carlisle, 3 B. & Ald. 161; Hawk. P. C. b. 1, c. 5. Vide sup. vol. II. p. 38, et post, c. x.

(*n*) 4 Bl. Com. p. 50.

(*o*) Vide sup. vol. III. pp. 53, et seq.

[undisturbed liberty of conscience to the members of the national Church, which the retainers to every petty conventicle enjoy. And, accordingly, it is provided by statute 1 Edw. VI. c. 1, and 1 Eliz. c. 1, that whoever reviles the sacrament of the Lord's Supper shall be punished by fine and imprisonment. And by the statute 1 Eliz. c. 2, that if any *minister* shall speak any thing in derogation of the Book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second: and, if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second offence he shall be deprived, and suffer one year's imprisonment: and, for the third, shall in like manner be deprived, and suffer imprisonment for life.]

The same Act provides also, that [if *any person* whatsoever shall in plays, songs, or other open words, speak any thing in derogation, depraving or despising of the said book of prayer, or forcibly prevent the reading of it, or cause any other service to be used in its stead,—he shall forfeit, for the first offence, a hundred marks; for the second, four hundred: and, for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life. These penalties were framed in the infancy of our present establishment, when the disciples of Rome and of Geneva united in inveighing with the utmost bitterness against the English liturgy; and the terror of these laws, (for they seldom, if ever, were fully executed,) proved a principal means, under Providence, of preserving the purity as well as decency of our national worship. Nor can their continuance to this time, (of the milder penalties at least,) be thought too severe and intolerant; so far as they are levelled at the offence, not of *thinking* differently from the national Church, but of *railing* at that Church and *obstructing* its ordinances, for not submitting its public judgment to the private opinion of others. For though it is clear that no restraint should be laid upon rational and

[dispassionate discussions of the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate (*p*).]

V. Another offence against God and religion, is that [of profane and common *swearing* and *cursing*. By the last statute against which, 19 Geo. II. c. 21, which repeals all former ones, every labourer, sailor, or soldier, profanely cursing or swearing, shall forfeit one shilling (*q*); every other person, under the degree of a gentleman, two shillings; and every gentleman or person of superior rank, five shillings; to the poor of the parish] wherein such offence was committed. And, [on a second conviction, shall forfeit double, and for every subsequent offence, treble, the sum first forfeited, with all charges of conviction; and, in default of payment, shall be sent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing or the testimony of one witness. And any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice, and there convict him;] but the conviction must be within eight days after the committal of the offence. [If the justice omits his duty, he forfeits five pounds, and the constable forty shillings.]

VI. Another offence of the description under consideration, is that of *using pretended witchcraft, conjuration, enchantment, and sorcery*. Our law once included in the list of crimes, that of *actual* witchcraft or intercourse with evil spirits; and though it has now no longer a place among them, its exclusion is not to be understood as implying a denial of the possibility of such an offence. To deny this,

(*p*) See also the provisions contained in 9 & 10 Will. 3, c. 32, sup. p. 286.

(*q*) It also forms one of the articles of war contained in 24 & 25 Vict. c. 115, for the government of the navy,

that any person subject to that Act who shall be guilty of profane swearing, shall be dismissed her majesty's service with disgrace, or suffer such lesser punishment as by that Act authorized under sect. 48.

would be to contradict [the revealed word of God in various passages both of the Old and New Testament; and the thing itself, is a truth to which every nation in the world hath in its turn borne testimony; either by examples seemingly well attested, or by prohibitory laws, which at least suppose the possibility of a commerce with evil spirits. The civil law punishes with death not only the sorcerers themselves, but also those who consult them (*r*); imitating in the former the express law of God (*s*), “Thou shalt not suffer a witch to live.” And our laws, both before and since the Conquest, have been equally penal; ranking this crime in the same class with heresy, and condemning both to the flames (*t*). The President Montesquieu ranks them also both together, but with a very different view; laying it down as an important maxim, that we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptionable conduct, the purest morals, and the constant practice of every duty in life, are not a sufficient security against the suspicion of crimes like these (*u*). And indeed, the ridiculous stories that are generally told, and the many impostures and delusions that have been discovered in all ages, are enough to demolish all faith in such a doubtful crime: if the contrary evidence were not also extremely strong. Wherefore it seems to be the most eligible way to conclude, with an ingenious writer of our own, that in general there has been such a thing as witchcraft, though one cannot give credit to any particular modern instance of it (*v*).

Our forefathers were stronger believers when they enacted, by statute 33 Henry VIII. c. 8, all witchcraft and sorcery to be felony without benefit of clergy. And again, by statute 1 Jac. I. c. 12, that all persons invoking any evil spirit; or consulting, covenanting with, entertaining, employing, feeding or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witch-

(*r*) Cod. l. 9, c. 18.

(*s*) Exod. xxii. 18.

(*t*) 3 Inst. 44.

(*u*) Sp. L. b. 12, c. 5.

(*v*) Mr. Addison, Spect. No. 117.

[craft, sorcery, charm or enchantment; or killing or otherwise hurting any person by such infernal arts;—should be guilty of felony and suffer death: and that if any person should attempt, by sorcery, to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, (though the same were not effected,) he, or she, should suffer imprisonment and pillory for the first offence, and death for the second. These Acts long continued in force, to the terror of all antient females in the kingdom: and many poor wretches were sacrificed, thereby, to the prejudice of their neighbours and their own illusions; not a few having, by some means or other, confessed the fact at the gallows. But all executions for this dubious crime are now at an end: our legislature having at length followed the wise example of Louis the fourteenth in France; who thought proper, by an edict, to restrain the tribunals of justice from receiving informations of witchcraft (*w*). And accordingly it is with us enacted, by statute 9 Geo. II. c. 5, that no prosecution shall for the future be carried on against any person for witchcraft, sorcery, enchantment, or conjuration; or for charging another with any such offence (*x*).] But, by the same statute, persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in any occult or crafty science,—are punishable by imprisonment: and by 5 Geo. IV. c. 83, s. 4, persons using any subtle craft, means, or device, by palmistry or otherwise, to deceive his majesty's subjects,—are to be deemed *rogues* and *vagabonds*; and to be punished with imprisonment and hard labour (*y*).

VII. [A seventh species of offenders in this class, are all *religious impostors*; such as falsely pretend an extraor-

(*w*) Voltaire, Siècl. Louis 14, c. 29; Mod. Un. Hist. xxv. 215.

(*x*) This Act is said to have passed, in consequence of an old woman being drowned at Tring, in Hertford-

shire, by her too credulous neighbours, who suspected her of witchcraft.—(Christian's Blackstone.)

(*y*) As to *rogues and vagabonds*, vide post, chap. XII.

[dinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment (z).]

VIII. *Simony* is also to be considered as an offence against religion, [by reason of the sacredness of the charge which is thereby profanely bought and sold.] Its nature and the punishment to which it is subject having been already described in a former part of this work,—where we treated of the endowments and provisions of the Church (a),—it will be unnecessary to recur to them in this place, and we shall pass on to consider—

IX. *Profanation of the Lord's Day*, (commonly, but improperly, called *sabbath breaking*,) which is a ninth offence of the class now in question. For as it is deemed, by the best authorities on religious subjects, to be a violation of the divine law, under the new as well as the old dispensation, so there is a [notorious indecency and scandal, in permitting any secular business to be publicly transacted on that day, in a country professing Christianity:] and it is found, in fact, that a [corruption of morals usually follows its profanation.] It is unquestionable, besides, that [the keeping one day in seven holy, as a time of relaxation and refreshment, as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity, and savage selfishness of spirit. It enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens, but which yet would be worn out and effaced

(z) Hawk. P. C. b. 1, c. 5, s. 3.

(a) Vide sup. vol. III. p. 76.

[by an unremitted continuance of labour without any stated times of recalling them to the worship of their Maker; and therefore the laws of King Athelstan, forbade all merchandizing on the Lord's day, under very severe penalties (*b*); and by the statute 27 Henry VI. c. 5, no fair or market shall be held on Good Fridays or on any Sunday, except the four Sundays in harvest,] and unless for necessary victual, [on pain of forfeiting the goods exposed to sale (*c*). Also by statute 1 Car. I. c. 1, no persons shall assemble, out of their own parishes, for any sport whatever upon this day; nor, in their parishes, shall use any bull, or bear, baiting, interludes, plays, or other *unlawful* exercises or pastimes,—on pain that every offender shall pay three shillings and fourpence to the poor.] Moreover, by statute 29 Car. II. c. 7, no tradesman, artificer, workman, labourer, or other person whatever, is allowed to do any work of their ordinary calling upon the Lord's day,—works of necessity and charity only excepted,—on pain that every person, of fourteen years, so offending shall forfeit five shillings. And, by the same Act, no person shall publicly expose to sale any wares whatever upon the Lord's day, upon pain of forfeiting the goods; nor any drover, or the like, travel or come into his inn or lodging, upon pain of forfeiting twenty shillings; nor any person serve or execute any process, (except for treason, felony or breach of the peace): and such service or execution, if made, shall be void to all intents and purposes whatever (*d*). Also, by 21 Geo. III. c. 49, any

(*b*) C. 24.

(*c*) The exception as to Sundays in harvest-time, is repealed by 13 & 14 Vict. c. 23.

(*d*) See also as to carriers, 3 Car. 1, c. 1; as to fish-carriages, 2 Geo. 3, c. 15; as to bakers, 34 Geo. 3, c. 61; 50 Geo. 3, c. 73, s. 3; 1 & 2 Geo. 4, c. 50, s. 11; as to bakers in London, 3 Geo. 4, c. cxvi. s. 16; as to watermen, 11 & 12 Will. 3, c. 24, s. 13;

as to watermen on the Thames, 7 & 8 Geo. 4, c. lxxv.; as to killing game on Sunday, 1 & 2 Will. 4, c. 32, s. 3. And see, as to the construction of statute 29 Car. 2, c. 7, *Sandiman v. Breach*, 7 Barn. & Cress. 96; *R. v. Whitnash*, *ibid.* 596; *Peate v. Dickenson*, 5 Tyr. 116; *Scarfe v. Morgan*, 1 H. & H. 292; *Beaumont v. Brengeri*, 5 C. B. 301.

house which shall be used for public entertainment or public debate on the Lord's day, and to which persons shall be admitted by the payment of money, shall be deemed a *disorderly house*: and subject to the punishment which the law provides in the case of houses of that description (e). And lastly, (as we found occasion to mention elsewhere,) there are enactments prohibiting the sale of liquors at public houses within the hours of divine service, on any Sunday, Christmas day, Good Friday, or on any fast or thanksgiving day, unless to a lodger in the house, or to a *bonâ fide* traveller. By 18 & 19 Vict. c. 118, in case of such prohibited sale, the penalty of a sum not exceeding 5*l.* is imposed for every offence, to be recovered on summary conviction before a justice of the peace. And every separate sale contrary to the law, is to be deemed a separate offence. And similar provisions (the forfeiture, however, being limited to forty shillings) are contained in the 23 Vict. c. 27, with regard to the refreshment houses introduced by that Act (f).

(e) As to disorderly houses, vide
post, c. XII.

(f) Vide sup. vol. III. pp. 306,
308.

CHAPTER VIII.

OF OFFENCES AGAINST THE LAW OF NATIONS.

[ACCORDING to the method marked out in the preceding chapter, we are next to consider the offences more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another: those, at least, which are particularly animadverted on, as such, by the English law.]

The law of nations, to which we have before had occasion briefly to advert (*a*), is a system of rules, [established by universal consent, among the civilized inhabitants of the world (*b*); in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent States, and the individuals belonging to each: being founded upon this general principle, that different nations ought, in time of peace, to do to one another all the good they can: and in time of war, as little harm as possible, without prejudice to their own real interests (*c*). And as none of these States will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree,] and to which all civilized States have assented.

[In arbitrary States this law, whenever it contradicts, or is not provided for by the municipal law of the country, is

(*a*) Vide sup. vol. i. p. 25.

(*c*) Sp. L. b. 1, c. 7.

(*b*) Ff. 1, 1, 9.

[enforced by the royal power; but, since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and held to be the law of the land. And those Acts of Parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be a part of the civilized world. Thus, in mercantile questions, such as bills of exchange and the like, and in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature, the law merchant is constantly adhered to (*d*).

But though in civil transactions, and questions of property, between the subjects of different States, the law of nations has much scope and extent, as adopted by the law of England; yet the present branch of our inquiries will fall within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular State. For offences against this law, are principally incident to whole States or nations; in which case recourse can only be had to war, which is an appeal to the God of hosts, to punish such infractions of public faith as are committed by one independent people against another; neither State having any superior jurisdiction to resort to upon earth, for justice. But where the individuals of any State violate this general law, it is then the interest as well as duty, of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations, in their collective capacity, observe these universal rules, if private subjects were at liberty to break

(*d*) As to the law merchant, vide sup. vol. I. p. 56.

[them at their own discretion, and involve the two States in a war. It is, therefore, incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the State to which he belongs; and if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.]

The principal cases [in which the statute law of England interposes to aid and enforce the law of nations, as a part of the common law, by inflicting an adequate punishment upon offences against that universal law committed by private persons] are, in respect of offences of three kinds: I. Violation of safe-conducts; II. Infringement of the rights of ambassadors; and, III. Piracy.

I. [As to the first, *violation of safe-conducts* or *passports*, expressly granted by the sovereign or his ambassadors, to the subjects of a foreign power, in time of mutual war (*e*); or the committing acts of hostilities against such as are in amity, league, or truce with us, who are, in this case, under a general implied safe-conduct;—these are breaches of the public faith: without the preservation of which, there can be no intercourse or commerce between one nation and another. And such offences may, (according to the writers upon the law of nations,) be a just ground of a national war; since it is not in the power of the foreign prince to cause justice to be done to his subject by the very individual delinquent, but he must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law; and more especially as it is one of the articles of *Magna Charta*, that foreign merchants should be entitled to safe-conduct and security throughout the kingdom (*f*);—there is no question but that any violation of either the person or property of such foreigner, may be punished by indictment in the name of

(*e*) Vide sup. vol. II. p. 516.

(*f*) 9 Hen. 3, c. 30.

[the sovereign; whose honour is more particularly engaged, in supporting his own safe-conduct. And when this malicious rapacity was not confined to private individuals, but broke out into general hostilities,—by the statute 2 Hen. V. st. 1, c. 6, the breaking of truce and safe-conducts, or abetting and receiving the truce-breakers, was, (in affirmance and support of the law of nations,) declared to be treason against the crown and dignity of the king; and conservators of truce and safe-conducts, were appointed in every port, and empowered to hear and determine such treasons when committed at sea, according to the antient marine law then practised in the admiral's court. Which statute, so far as it made these offences amount to treason, was suspended by 14 Hen. VI. c. 8, and repealed by 20 Hen. VI. c. 11; but it was revived by 29 Hen. VI. c. 2, which gave the same powers to the lord chancellor, associated with either of the chief justices, as belonged to the conservators of truce and their assessors; and enacted that, notwithstanding the party be convicted of treason, the injured stranger should have restitution out of his effects, prior to any claim of the Crown. And it is further enacted by the statute 31 Hen. VI. c. 4, that if any of the king's subjects attempt or offend upon the sea, or in any port within the king's obeisance, against any stranger in amity, league or truce, or under safe-conduct,—and especially by attaching his person, or spoiling him or robbing him of his goods;—the lord chancellor, (with any of the justices of either the King's Bench or Common Pleas,) may cause full restitution and amends to be made to the party injured.

It is to be observed, that the suspending and repealing Acts of the fourteenth and twentieth years of Henry the sixth, and also the reviving Act of the twenty-ninth of the same monarch, were only temporary; so that it should seem that, after the expiration of them all, the statute of the second year of Henry the fifth continued in full force: but yet it is considered as extinct by the statute 14 Edw. IV. c. 4; which revives and confirms all statutes and ordinances

[made before the accession of the house of York, against breakers of amities, truces, leagues, and safe-conducts, with an express exception to the statute of 2 Hen. V. st. 1, c. 6. But however that may be,] this statute was, (according to Blackstone,) [finally repealed by the general statutes of Edward the sixth, and Queen Mary, for abolishing new created treasons (*g*); though Sir Matthew Hale seems to question it, as to treason committed on the sea (*h*). But the statute of 31 Hen. VI. remains in full force to this day.

II. As to the rights of *ambassadors*,—which are also established by the law of nations, and are therefore matter of universal concern,—they have formerly been treated of at large,] in that part of this work in which we discussed the nature and extent of the royal prerogative. And it may be recollected, that any violation of them amounts, by express legislative enactment, to a crime of a highly penal nature (*i*).

III. [Lastly, the crime of *piracy*, (or robbery and depredation upon the high seas,) is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis* (*h*). As, therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him; so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would, in a state of nature, have been otherwise entitled to do, for any invasion of his person or personal property.

By the antient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance; and, by an alien, to be felony

(*g*) Vide sup. p. 245, and 4 Bl. Com. p. 70.

(*h*) 1 Hale, P. C. 267.

(*i*) Vide sup. vol. II. p. 506 et seq.

(*k*) 3 Inst.* 113.

[only; but now, since the statute of treasons, 25 Edw. III. c. 2, it is held to be only felony in a subject (*k*). Formerly, it was only cognizable by the admiralty courts (*l*):] whose proceedings, (as we have elsewhere remarked,) are founded in a great measure upon the rules of the civil law (*m*). [But, it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land,—the statute 28 Hen. VIII. c. 15, established a new jurisdiction for this purpose; which proceeds according to the course of the common law, and of which we shall say more hereafter (*n*).

The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas,] or other places where the admiralty has jurisdiction, [which, if committed upon land, would have amounted to felony there (*o*). But by statute, some other offences are made piracy also; as, by stat. 11 & 12 Will. III. c. 7,] made perpetual by 6 Geo. I. c. 19, [if any natural-born subject commits any act of hostility upon the high seas, against others of his majesty's subjects, under colour of a commission from any foreign power; this, though it would be only an act of war in an alien, shall be construed piracy in a subject. And further (by the same Act), any commander, or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition or goods; or yielding them up, voluntarily, to a pirate; or conspiring to do these acts;—or any person assaulting the commander of a vessel to hinder him from fighting his ship, or confining him, or making or endeavouring to make a revolt on board (*p*);—shall be adjudged a pirate, felon, and robber.] Again,

(*k*) 3 Inst. 113.

(*l*) Hawk. P. C. b. 1, c. 37, s. 3.

(*m*) Vide sup. vol. III. p. 455.

(*n*) Vide post, c. XIV.

(*o*) Hawk. P. C. b. 1, c. 37, As

to the admiralty jurisdiction, vide sup. vol. I. p. 119; et post, c. XIV.

(*p*) See R. v. M'Gregor, 1 Car. & Kir. 430; R. v. Hastings, 1 M. C. C. R. 82.

[by the statute 8 Geo. I. c. 24,] made perpetual by 2 Geo. III. c. 28, s. 7, [the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in anywise consulting, combining, confederating, or corresponding with them; or the forcibly boarding any merchant vessel, (though without seizing or carrying her off,) and destroying or throwing any of the goods overboard;—shall be deemed piracy.] Moreover, [by statute 18 Geo. II. c. 30, any natural-born subject or denizen, who in time of war shall commit hostilities at sea against any of his fellow subjects, or shall assist an enemy on that element,—is liable to be tried and convicted as a pirate (*q*).] And, lastly, in our own times, a further addition has been made to the list of piratical offences. For, with the view of putting an effectual stop to the slave trade, the statute 5 Geo. IV. c. 113 (*r*), enacts, that if any British subject, wherever residing,—and whether within the dominion of Great Britain, or of any foreign country, or in the colonies,—shall (except in some particular cases therein specified), within the jurisdiction of the Admiralty, knowingly convey or assist in conveying, persons as slaves, or to be dealt with as slaves, or ship them for that purpose, he shall be deemed guilty of piracy, felony and robbery (*s*).

Formerly the punishment for most piratical offences, was death. But it has been thought expedient to relax this severity; and, now, whoever shall be convicted of piracy,

(*q*) Blackstone remarks (vol. iv. p. 73), that, under the statutes relating to piracy, commanders or seamen wounded, and the widows of seamen slain, in any engagement with pirates, are entitled to a bounty to be divided amongst them, not exceeding one-fiftieth part of the value of the cargo on board. And further, that if the commander displays cowardice, he shall forfeit all his wages, and suffer six months'

imprisonment. As to the condemnation in the Court of Admiralty of ships and goods taken from pirates, and the salvage payable by the owners, vide sup. vol. III. p. 457.

(*r*) See also the enactments in repression of the slave trade, cited vol. I. p. 112, n. (*q*).

(*s*) See *R. v. Zulueta*, 1 Car. & Kir. 215; *Buron v. Denman*, 2 Exch. 167.

is liable to be sentenced to penal servitude for life or any term not less than three years; or to be imprisoned, (with or without hard labour,) for any term not more than two years (*u*). But whoever, with intent to commit, or at the time of or immediately before or after committing, the crime of piracy, in respect of any ship or vessel, shall assault with intent to murder, or stab or wound, or unlawfully do any act by which the life of any person on board of or belonging to such ship or vessel may be endangered,—is liable to suffer death as a felon (*x*).

(*u*) 5 Geo. 4, c. 113; 7 Will. 4 & 1 Vict. c. 88; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*x*) 7 Will. 4 & 1 Vict. c. 88, s. 2. As to the general law with respect to wounding, &c. with intent to murder, vide sup. pp. 161, 162.

CHAPTER IX.

OF OFFENCES AGAINST PUBLIC JUSTICE.

WE are now arrived, according to the arrangement before laid down, at the consideration of offences against public justice (*a*). Of these, some are felonious, others only misdemeanors.

I. The first of these which we shall mention, are those of stealing, injuring, and forging or falsifying *records*; which are high offences against public justice. For, as observed by Blackstone, [no man's property would be safe if records might be suppressed or falsified, or persons' names be falsely usurped in courts, or before their public officers(*b*).] With regard to the two first of these offences, they are provided against by 24 & 25 Vict. c. 96, s. 30, by which it is made a felony, punishable by penal servitude to the extent of *three* years, or imprisonment not more than two years, with or without hard labour and solitary confinement, in whomsoever shall steal or fraudulently take from its proper deposit or custody,—or who shall maliciously cancel, obliterate, injure or destroy,—any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatever belonging to any court of record or equity, or relating to any matter in such court(*c*). And with regard to the forgery or falsification of records, it is provided against by 24 & 25 Vict. c. 98, ss. 27, 28; which make it a felony punishable by imprisonment as above mentioned, or penal servitude to the extent of *seven* years, in whomsoever shall forge, or fraudulently alter, or

(*a*) Vide sup. p. 232. At a former place we remarked, that crimes are all considered as contempts of public justice (vide sup. p. 130), but the crimes spoken of in the present chapter are those which are directed more

particularly against public justice.

(*b*) 4 Bl. Com. p. 128.

(*c*) If the court think fit, it may also bind over the offender to keep the peace (sect. 117). 24 & 25 Vict. c. 96, s. 30.

utter any such court record or document as above specified. And that the above penalties shall also attach to any person who, as clerk of any court or otherwise, shall knowingly utter any false copy or certificate of any record, or forge the seal, or process, of any court of record (*a*). There are also provisions on this subject contained in an earlier statute, viz., the 1 & 2 Vict. c. 94, intitled “An Act for keeping safely the Public Records.” And by that statute it is enacted, that for any person employed in the public Record Office to certify any writing as a true copy of a record in the custody of the Master of the Rolls, knowing the same to be false in any material part,—shall be felony: and he is punishable with penal servitude for life, or not less than three years; or imprisonment for not more than four, nor less than two years (*b*). Moreover, by 14 & 15 Vict. c. 99 (the “Evidence Amendment Act, 1851”), if any officer authorized or required by that Act to furnish any certified copies or extracts, shall wilfully certify any document as being a true copy or extract, knowing that the same is not so, he shall be guilty of a misdemeanor; and be liable, upon conviction, to imprisonment for any term not exceeding eighteen months (*c*).

II. *Striking, or other outrage, in the superior courts of justice*, in Westminster Hall, or at the assizes, is highly penal. Indeed [by the antient common law before the Conquest, striking in the king’s courts of justice, or drawing a sword therein, was a capital felony (*d*); and our modern law retains so much of the antient severity, as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or blow in] the superior courts, or courts of assize or *oyer* and *terminer*, [whether blood be drawn or not: or even assaulting a judge sitting in the court, by drawing a weapon, without any blow struck;—is

(*a*) If the court think fit, it may also bind over the offender to keep the peace. (24 & 25 Vict. c. 98, s. 51.)

(*b*) 1 & 2 Vict. c. 94, s. 19; 16 &

17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*c*) 14 & 15 Vict. c. 99, s. 15.

(*d*) Wilk. Leg. Anglo-Sax. LL. Inæ, c. 6; LL. Canut. c. 56; LL. Alured. c. 7.

[punishable with the loss of the right hand (*e*), imprisonment for life, and forfeiture of goods and chattels, and of the profits of the offender's lands during life (*f*).] Moreover, not only such as commit actual violence of this description, [but such as use threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision; and have been punished with large fines, imprisonment, and other corporal punishment (*g*). And even in the inferior courts of the king, an affray or contemptuous behaviour is punishable with a fine, by the judges there sitting; as by the steward in a court leet, or the like (*h*).]

III. Another species of offence,—somewhat allied to the last,—is that of *intimidation, or other improper demeanor, practised towards the parties or witnesses in a court of justice*. [As if a man assaults or threatens his adversary for

(*e*) Lord Thanet and others were prosecuted by an information filed by the attorney-general, for a riot at the trial of Arthur O'Connor and others for treason, under a special commission at Maidstone. Two of the defendants were found guilty, generally. The three first counts charged (*inter alia*,) that the defendants did riotously make an assault on one J. R., and did then and there *beat, bruise, wound* and ill-treat the said J. R., in the presence of the commissioners. When the defendants were brought up for judgment, Lord Kenyon expressed doubts, whether, upon this information, the court was not bound to pronounce the judgment of amputation of the right hand, &c. as required in a prosecution expressly for striking in a court of justice. In consequence of these doubts, the attorney-general entered a *nolle pro-*

sequi upon the three first counts; and the court pronounced judgment of fine and imprisonment, as for a common riot.—(Christian's Blackstone.)

(*f*) Staundf. P. C. 38; 3 Inst. 140, 141; Hawk. b. 1, c. 21, s. 3. So it is laid down that a *rescue* of a prisoner from any of the said courts, without striking a blow, is punishable with perpetual imprisonment and forfeiture of goods, and of the profits of lands during life; but as no actual blow is given, the amputation of the hand is excused. (4 Bl. Com. p. 125.) See as to *rescue* in other cases, post, p. 309.

(*g*) Harrison's case, Cro. Car. 503. As to the power of the court itself, against which the contempt is committed, to punish it in a summary way, vide sup. vol. III. p. 380, et post, c. xv.

(*h*) Hawk. P. C. b. 1, c. 21, s. 11.

[suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty (*i*):] or if a man endeavours to dissuade a witness from giving evidence, or advises a prisoner to stand mute;—these are all impediments to justice, are high misprisions and contempts of the king's courts, and are punishable with fine and imprisonment. Antiently, indeed, it was held, [that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made an accessory to the offence, if felony, and in treason, a principal; and at this day it is agreed that he is guilty of a high misprision, and liable to be fined and imprisoned (*h*).]

So as regards the jurors, the offence may be committed, which is described in the books as *embracery*; that is, [attempting to influence them corruptly to one side, by promises, persuasions, entreaties, money, entertainments, and the like. The punishment for this misdemeanor in the person embracing and the juror embraced is,] by the common law,—and also by statute 6 Geo. IV. c. 50, s. 61,—fine and imprisonment (*l*).

IV. A fourth offence of the same general character is, *obstructing a lawful arrest, or, generally, the execution of lawful process*. [This is, at all times, an offence of a very high and presumptuous nature: but more particularly so, when it is an obstruction of an arrest upon criminal process: and it hath been holden that the party opposing

(*i*) 3 Inst. 141, 142. Blackstone remarks (vol. iv. p. 126), that these offences, when they proceeded further than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods; and he cites *Stiernh. de Jure Goth.* l. 3, c. 2.

(*h*) See Barr. on Statutes, 212; 27 Ass. Pl. 44, s. 4, fol. 138; Hawk.

P. C. b. 1, c. 21, s. 15.

(*l*) The false verdict of jurors, whether occasioned by *embracery* or not, was antiently considered as criminal; and therefore severely punished by means of the writ of *attaint*. [See 3 Bl. Com. pp. 388, 402; 6 Geo. 4, c. 50, s. 60; sup. vol. III. p. 659, n. (*c*).]

[such arrest, becomes thereby *particeps criminis* ; that is, an accessory in felony, and a principal in treason (*m*). Formerly one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, (especially in London and Southwark,) where indigent persons assembled together to shelter themselves from justice,—under the pretext of their having been antient palaces of the Crown or the like (*n*). But all of these sanctuaries for iniquity are now demolished, and the opposing of any process therein is made highly penal, by the statutes 8 & 9 Will. III. c. 27 ; 9 Geo. I. c. 28 ; 11 Geo. I. c. 22 ;] and 1 Geo. IV. c. 116 : which enact, [that persons opposing the execution of any process in such pretended privileged places within the bills of mortality, or abusing any officer in his endeavour to execute his duty therein, so that he receives bodily hurt ;] and all persons aiding and abetting such opposition ; shall be guilty of felony. The principal provisions, however, as regard the offence now under consideration, are contained in the 24 & 25 Vict. c. 100, ss. 18, 38, which we had occasion to notice in reference to offences against the person ; and to that part of the work the reader is accordingly referred (*o*).

V. *Escape and Prison-breach.* An *escape* of a person, lawfully arrested for crime (whether felony or misdemeanor), by gaining his liberty before he is delivered by course of law, [is also an offence against public justice (*p*). And the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner,—the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to

(*m*) Hawk. P. C. b. 2, c. 17, s. 1.

(*o*) Vide sup. pp. 164, 181.

(*n*) Such as *White Friars*, and its environs ; the *Savoy* ; and the *Mint*, in Southwark. Some further information on the subject of the law of sanctuary will be found, post, c. XXI.

(*p*) Hawk. P. C. b. 2, c. 17, s. 3 ; c. 19, ss. 2, 3. As to evidence of escape, breach of prison, and rescue, see 4 Geo. 4, c. 64, s. 44.

[submit himself quietly to custody, till cleared by the due course of justice. Officers, therefore, who after arrest *negligently* permit a felon to escape, are punishable by fine(*r*); but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence: for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody; whether treason, felony or trespass. And this, whether he were actually committed to gaol, or only under a bare arrest(*s*). But the officer cannot be thus punished] as for felony(*t*), [till the original delinquent hath actually received judgment; or been attainted upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested; otherwise it might happen that the officer might be punished for felony, and the person arrested and escaping might turn out to be an innocent man. But before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor,] and may be kept to hard labour besides(*u*). We may add here, that an escape permitted by a private person, is an offence of the same description as one permitted by an officer. For if any person has another in his lawful custody, as for crime committed, and suffers him to escape before he is delivered over to the proper authority, such person is liable to the same punishment as already stated in the case of a gaoler or other officer(*x*).

As for the prisoner himself, *breach of prison*(*y*), or even conspiring to break it(*z*), was felony at the common

(*r*) 1 Hale, P. C. p. 600.

(*s*) Ib. p. 390; Hawk. P. C. b. 2, c. 19, s. 22.

(*t*) It is said, however, he is punishable, in the case of *treason*, where the party escaping has been actually guilty of treason, whether

he has been attainted of it or not. Hawk. P. C. b. 2, c. 19, s. 26.

(*u*) 14 & 15 Vict. c. 100, s. 29.

(*x*) Hawk. P. C. b. 2, c. 20, s. 6.

(*y*) 1 Hale, P. C. 607. See *R. v. Haswell*, R. & R. C. C. R. 458.

(*z*) Bract. l. 3, tr. 2, c. 9.

law for whatever cause he was committed(*a*). [But this severity is mitigated by the statute *De frangentibus prisonam*, (1 Edw. II. st. 2,) which enacts, that no person shall have judgment of life or member for breaking prison,] unless imprisoned for some cause which required such judgment in case of his conviction(*b*). [But to break prison and escape(*c*), when lawfully committed for any treason or felony, remains still felony as at the common law:] and is now punishable with penal servitude for not more than seven or less than three years; or by imprisonment, (with or without hard labour, solitary confinement and whipping,) not exceeding two years(*d*). [And to break prison, whether it be a county gaol or other usual place of security, when lawfully confined upon any other inferior charge, is still punishable as a high misdemeanor by fine and imprisonment: for the statute which ordains that such offence shall be no longer capital, never meant to exempt it entirely from every degree of punishment(*e*).] And to be at large (without lawful cause) before the expiration of the term for which an offender has been sentenced to be kept in penal servitude, is punishable by penal servitude for life; and previous imprisonment, with or without hard labour, for any term not exceeding four years; or else by imprisonment, with or without hard labour, not exceeding two years(*f*).

VI. *Rescue and aiding prisoners to escape.* [*Rescue*

(*a*) 1 Hale, P. C. 607.

(*b*) Ib. p. 609.

(*c*) It seems that if the prisoner break prison but do not actually escape, it is no felony. Hawk. P. C. b. 2, c. 18, s. 11.

(*d*) 7 & 8 Geo. 4, c. 28, ss. 8, 9; 7 Will. 4 & 1 Vict. c. 90, s. 5; 14 & 15 Vict. c. 100, s. 29; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*e*) Hawk. P. C. b. 2, c. 18, s. 20.

(*f*) 5 Geo. 4, c. 84, s. 22; 4 & 5

Will. 4, c. 67; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. See also as to prison breach and escapes from *Millbank*, 6 & 7 Vict. c. 26, s. 22; from *Parkhurst*, 1 & 2 Vict. c. 82, ss. 12, 13; from *Pentonville*, 5 & 6 Vict. c. 29, s. 24; As to the apprehension of persons escaping from England to Scotland, and *vice versâ*, see 13 Geo. 3, c. 31. As to escapes to and from Ireland, see 44 Geo. 3, c. 92, s. 3.

[is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing, as it would have been in a gaoler to have *voluntarily* permitted an escape (*g*). A rescue therefore of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor also (*h*).] But [here likewise,—as for voluntary escapes,—the principal must first be attainted or receive judgment, before the rescuer can be punished] as for felony: [and for the same reason; because perhaps in fact it may turn out that there has been no offence committed (*i*).] Yet even before the attainder of the principal, the rescuer may be prosecuted at the discretion of the Crown, as for a misprision (*k*). Moreover, *aiding a prisoner to escape* in whatever way, is an obstruction to the course of justice, and a felony at common law if the prisoner was in custody on a charge of felony; and, in other cases, a misdemeanor (*l*). The offences of rescue and of aiding prisoners to escape, have now, however, been specially provided against by several statutes. For by 25 Geo. II. c. 37, s. 9, if any person shall rescue, or attempt to rescue, out of prison a person committed for murder, or found guilty of murder; or rescue, or attempt to rescue, any person convicted of murder, while going to execution or during execution (*m*),—the person so offending shall be deemed guilty of felony, and he may be sentenced to penal servitude for life, or not less than three years; or to imprisonment, with or without hard labour and solitary confinement, for not more than two years (*n*).

(*g*) Hawk. P. C. b. 2, c. 21.

(*h*) It is a misdemeanor in the rescuer, though the person rescued be confined for debt only, and not on any criminal charge. (*R. v. Allan*, 1 Car. & M. 295.)

(*i*) 1 Hale, P. C. 598, 607; Fost. 344.

(*k*) Hawk. P. C. b. 2, c. 21, s. 8.

(*l*) *R. v. Burridge*, 3 P. Wms.

439. See *R. v. Allan*, Car & M. 295.

(*m*) By the same Act it is also felonious to rescue or attempt to rescue the body of a murderer *after* execution.

(*n*) 25 Geo. 2, c. 37, s. 9; 7 Will. 4 & 1 Vict. c. 91; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

By 52 Geo. III. c. 156, every person assisting a prisoner *of war* to escape, shall be guilty of felony; and he may be sentenced to the same punishments as just mentioned (*o*). By 1 & 2 Geo. IV. c. 88, s. 1, the rescuer of any person charged with felony, is declared guilty of felony; and he may be sentenced to penal servitude for not more than seven or less than three years; or to imprisonment, with or without hard labour, for not less than one or exceeding three years (*p*). By 4 Geo. IV. c. 64, (an Act for consolidating and amending the laws relative to the regulations of certain gaols and houses of correction in England and Wales,) if any person shall by any means whatever aid and assist any prisoner to escape, or any prisoner attempting to escape, from any prison,—such offender, whether an escape be actually made or not, shall be guilty of felony; and he may be sentenced to penal servitude for not more than fourteen years or less than three years, or to imprisonment as above specified (*q*). And by 5 Geo. IV. c. 84, whoever shall rescue, or attempt to rescue, any offender under sentence or order of penal servitude (*r*), from the custody of any person charged with his removal; or shall convey to such offender any disguise, or instrument for effecting escape, or arms; shall be guilty of felony: and he may be sentenced to penal servitude for life, and previous imprisonment, with or without hard labour, not exceeding four years, or to imprisonment, with or without hard labour, not exceeding two years (*s*). ,

(*o*) 52 Geo. 3, c. 156; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to this offence, see *R. v. Martin*, R. & R. C. C. R. 196.

(*p*) 1 & 2 Geo. 4, c. 88, s. 1; 14 & 15 Vict. c. 100, s. 29; 20 & 21 Vict. c. 3.

(*q*) 4 Geo. 4, c. 64, s. 43; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. (See *Holloway v. The Queen*, 17 Q. B. 317.) There

is also a statute of 16 Geo. 2, c. 31, relative to the offence of aiding prisoners to escape; but it is repealed by 4 Geo. 4, c. 64, s. 1, so far as relates to the escape of any prisoner from any prison to which the latter Act extends.

(*r*) The expression used in 5 Geo. 4, c. 84, is “transportation or banishment;” but see 20 & 21 Vict. c. 3, s. 6.

(*s*) 5 Geo. 4, c. 84, s. 22; 4 & 5

VII. Another offence of this class, is [that of *taking a reward under pretence of helping the owner to his stolen goods*. This was a contrivance carried to a great length of villany in the reign of George the first, the confederates of the felons thus disposing of stolen goods, at a cheap rate, to the owners themselves, and thereby stifling all further inquiry. The famous Jonathan Wild had under him a well-disciplined corps of thieves, who brought in all their spoils to him; and he kept a sort of public office, for restoring them to the owners at half price. To prevent which audacious practice,—to the ruin, and in defiance, of public justice,—it was enacted by 4 Geo. I. c. 11, that whosoever shall take a reward under the pretence of helping any one to stolen goods, shall suffer as the felon who stole them; unless he causes such principal felon to be apprehended and brought to trial, and also gives evidence against him. Wild, still continuing in his old practice, was, upon this statute, at last convicted and executed.] These provisions, indeed, have been since repealed by 7 & 8 Geo. IV. c. 27, s. 1; but they have been re-enacted, with such improvements as are calculated for the more effectual prevention of the offence. For by 24 & 25 Vict. c. 96, s. 101 (r), it is provided, that whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, extorted, embezzled or converted, or disposed of as in that Act mentioned,—shall (unless he shall have used all due diligence to cause the offender to be brought to trial for the same) be guilty of felony. And the punishment is penal servitude for seven or for not less than three years; or imprisonment, with or without hard labour and solitary confinement, for any term not exceeding two years; and, if a male under the age of eighteen

Will. 4, c. 67; 9 & 10 Vict. c. 24;
16 & 17 Vict. c. 99; 20 & 21 Vict.
c. 3.

(r) Re-enacting 7 & 8 Geo. 4, c.
29, s. 58, repealed by 24 & 25 Vict.
c. 95, as to the United Kingdom.

years, to be whipped, if the court shall so think fit, in addition to such imprisonment (s).

VIII. The offence of *compounding of felony*, is the taking of a reward for forbearing to prosecute an offence of that description; and one kind of it, (known in the books by the more antient appellation of *theft-bote*,) is where a party robbed [takes his goods again, or other amends upon agreement not to prosecute. This was formerly held to make a man accessory, but is now punished only with fine and imprisonment (t). This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. Indeed the Salic law—“*latroni cum similem habuit, qui furtum celare vellet, et occulte sine judice compositionem ejus admittere*” (u).] And by statute 24 & 25 Vict. c. 96, s. 102 (x), even publicly to advertise a reward for the return of any property stolen or lost, and in such advertisement to use any words purporting that no questions will be asked; or purporting that a reward will be paid for any lost or stolen property, without seizing or making inquiry after the person producing the same; or promising, or offering in such advertisement, to return to any pawnbroker or other person the money he may have advanced upon or paid for such property, or any other sum of money or reward for the return of the same;—subjects the advertiser, printer, and publisher to a forfeiture of fifty pounds each.

IX. Besides the last described offence, the mere concealment of a felony is by our law criminal; and is described, in the books, as *misprision of felony*. This is the concealment of a felony,—short of treason, the misprision of which has been before considered (y),—committed by

(s) The court may also, if it see fit, bind over the offender to keep the peace. (24 & 25 Vict. c. 96, s. 117.)

(t) Hawk. P. C. b, 1, c. 59, s. 6.

(u) Stiern. de Jure Goth. l. 3, c. 5.

(x) Re-enacting 7 & 8 Geo. 4, c. 29, s. 59, repealed as to the United Kingdom by 24 & 25 Vict. c. 95.

(y) Vide sup. p. 248.

another; but without such previous concert with, or subsequent assistance of, the person committing the felony, as will make the party concealing an accessory before or after the fact. And [the punishment of this in a public officer, (by the statute Westminster the first, 3 Edw. I. c. 9,) is imprisonment for a year and a day; in a common person, imprisonment for a less, but discretionary, time; and, in both, fine and ransom at the king's pleasure;] an expression which, as Blackstone remarks(*z*), signifies here (as in other cases where it occurs,) not [any extrajudicial will of the sovereign: but such as is declared by his representatives, the judges in his courts of justice—" *voluntas regis in curiâ, non in camerâ* " (*a*).]

X. Compounding of informations upon penal statutes, or of misdemeanors, is also illegal.

As to the first of these, the compounding of *informations upon penal statutes*, [it is a misdemeanor against public justice by contributing to make the laws odious to the public. At once, therefore, to discourage malicious informers, and to provide that offences, when discovered, shall be duly prosecuted,—it is enacted by 18 Eliz. c. 5, that if any person informing, under pretence of any penal law, makes any composition without leave] of one of the courts at Westminster; [or takes any money or promise from the defendant to excuse him;—which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not the public good,—he shall forfeit 10*l.*;] and he is also liable to suffer such imprisonment or additional fine, or both, as the court shall award, [and shall be for ever disabled to sue on any popular or penal statute (*b*).]

As to compounding *misdemeanors*: such a proceeding

(*z*) 4 Bl. Com. p. 121.

(*a*) 1 Hale, P. C. 375.

(*b*) The punishment given by 18 Eliz. for this offence, is altered as in

the text by the effect of 56 Geo. 3, c. 138. As to this offence, see *R. v. Best*, 9 Car. & P. 368; *R. v. Crisp*, 1 B. & A. 282.

without leave of one of the courts at Westminster, seems to be also illegal (c). But [it is not uncommon when a person is convicted of a misdemeanor more immediately affecting an individual,—as a battery, imprisonment or the like,—for the court to permit the defendant to *speach with the prosecutor*, before any judgment is pronounced: and if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuitry of a civil action (d).]

XI. [*Common barratry* is the offence of *frequently* (e) inciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise (f). The punishment for this offence in a common person, is by fine and imprisonment; but if the offender, (as is too frequently the case,) belongs to the profession of the law, a barrator, who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future. And indeed, it is now enacted, that if any one who hath been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney, solicitor or agent in any suit, the court, upon complaint, shall examine it in a summary way, and, if proved,] may direct the offenders to be kept in penal servitude for not more than seven or less than three years (g).

(c) See *Collins v. Blantern*, 2 Wils. 341; *Edgecombe v. Rodd*, 5 East, 297; *Keir v. Leeman*, 9 Q. B. 371; 4 Bl. Com. 136, note by Christian.

(d) Blackstone (vol. iv. p. 364) expresses a disapprobation of this practice, as contrary to the true policy of criminal jurisprudence. Even a voluntary forgiveness by the party injured "ought not," he says, "in true policy to intercept the stroke of justice."

(e) Barratry is said to be a forensic term borrowed from the Normans: the Anglo-Norman *baret* signifying a quarrel or contention. [See the notes to Bac. Abr. tit. Barratry (A).] To establish a single act of inciting, &c., is not sufficient. See *R. v. Hardwicke*, 1 Sid. 282; *R. v. Hannon*, 6 Mod. 311; *Hawk. P. C. b. 1, c. 81, s. 5*.

(f) *Hawk. P. C. b. 1, c. 81, s. 1*.

(g) 12 Geo. 1, c. 29; 21 Geo. 2, c. 3; 16 & 17 Vict. c. 99; 20 & 21

[Hereunto may also be referred another offence of equal malignity and audaciousness, that of suing another in the name of a fictitious plaintiff,—either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by 8 Eliz. c. 2, s. 4, to be punished by six months' imprisonment, and treble damages to the party injured.]

XII. [*Maintenance* is an offence that bears a near relation to the former; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it (*i*): a practice that was greatly encouraged by the first introduction of uses (*h*). This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression (*l*). And therefore by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or to do any act to support another's law suit, by money, witnesses or patronage (*m*). A man may, however, maintain the suit of his near kinsman (*n*), servant (*o*), or poor neighbour (*p*), out of charity and compassion, with impunity;]

Vict. c. 3. In the Attornies' Act, 6 & 7 Vict. c. 73, the statute 12 Geo. 1, c. 29, is recognized as existing, and is left unrepealed.

(*i*) Hawk. P. C. b. 1, c. 83, s. 23.

(*h*) Dr. and Stud. 203. As to uses, vide sup. vol. 1. p. 360.

(*l*) Co. Litt. 368 (*b*); 2 Inst. 208, 212, 213; Hawk. P. C. b. 1, c. 83, s. 23. Maintenance may consist, (according to Bacon) not only in the officious intermeddling in suits as described by Blackstone (vol. iv. p. 355), which is termed *curialis*; but also in assisting another to his pre-

tensions to lands, or holding them for him by force or subtilty, or stirring up quarrels in the county, in relation to matters wherein one is no way concerned. And this species is known by the name of *ruralis*. (See Bac. Abridg. in tit. Maintenance.)

(*m*) Ff. 48, 10, 28.

(*n*) Bac. ubi sup.; Hawk. ubi sup. s. 26.

(*o*) Hawk. ubi sup. ss. 31, 32, 33.

(*p*) Bro. Abr. tit. Maintenance, (14).

or he may maintain a suit in which he has any interest, actual or contingent (*q*). [Otherwise the punishment by common law,] and also by statute 1 Ric. II. c. 4, [is fine and imprisonment (*r*); and by statute 32 Hen. VIII. c. 9, a forfeiture of ten pounds.]

XIII. [*Champerty (campi partitio)* is a species of maintenance, and punished in the same manner (*s*),—being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense (*t*). Thus *champart*, in the French law, signifies a similar division of profits; being a part of the crop, annually due to the landlord by bargain or custom. In our sense of the word, it signifies the purchasing of a suit or right of suing; a practice so much abhorred by our law, that it is one main reason why a *chose in action*, or thing of which one hath the right, but not the possession, is not assignable at common law (*u*); because no man should purchase any pretence to sue in another's right. These pests of civil society, that are perpetually endeavouring to disturb the repose of their neighbours, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted upon by the Roman law, "*qui improbè coëunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Juliâ de vi privatâ tenentur*" (*x*). And they were punished by the forfeiture of a third part of their goods, and by perpetual infamy (*y*). Hitherto must also be referred the provisions

(*q*) Hawk. ubi sup. ss. 14, 15; Master v. Miller, 4 T. R. 340; Williamson v. Henley, 6 Bing. 299.

(*r*) Hawk. ubi sup. s. 38; 2 Inst. 208.

(*s*) Hawk. ubi sup. b. 1, c. 84, s. 1.

(*t*) Statute of Conspiracy, 33 Edw. 1, st. 2.

(*u*) As to this, vide sup. vol. 11. p. 45.

(*x*) FF. 48, 7, 10.

(*y*) There are on the subject of champerty the following statutes of antient date:—3 Edw. 1, c. 25; 13 Edw. 1, c. 49; 21 Edw. 1, stat. 3, c. 11; 33 Edw. 1, st. 3; 4 Edw. 3,

[of the statute 32 Hen. VIII. c. 9, that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder,—on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor (*a*).]

XIV. *Conspiracy* may be correctly described, in general, as a combination or agreement between several persons to carry into effect a purpose hurtful to some individual; or to particular classes of the community; or to the public at large (*b*): though this is subject to exception in the case where the purpose is a felonious one, and *actually accomplished*;—the offence of conspiracy, (which is a misdemeanor only,) being then merged in the felony. Thus there may be conspiracy to commit murder or other crime; to seduce a female (*c*); to injure the public health by selling unwholesome provisions (*d*); to raise the funds by the propagation of false intelligence (*e*); to defraud some person or persons of his or their property (*f*); and

c. 11. See also the following cases as to what amounts to maintenance and champerty: *Stevens v. Bagwell*, 15 Ves. jun. 139; *Williams v. Protheroe*, 5 Bing. 309; *Stanley v. Jones*, 7 Bing. 369; *Bell v. Smith*, 5 B. & C. 188; *In re Masters*, 1 Har. & Woll. 348.

(*a*) As to this statute, see *Cholmondeley v. Clinton*, 4 Bligh, N. S. 4.

(*b*) Conspiracy has been frequently said to consist either of an agreement for an unlawful purpose, or to effect a lawful purpose by unlawful means. (*R. v. Seward*, 1 A. & R. 713; *R. v. Jones*, 4 B. & Ad. 349.) But the correctness of the antithesis has been questioned on high authority, (*R. v. Peck*, 9 A. & E. 686;) and

it is clear that the terms *lawful* and *unlawful*, as here used, themselves require a definition. In many cases, too, it is difficult to distinguish precisely between the *purpose* and the *means*, in cases of conspiracy. As to the nature of this offence, see also *Reg. v. Carlisle*, 1 Dearsley's C. C. R. 337.

(*c*) See *R. v. Grey*, 3 St. Tr. 519; *R. v. Delaval*, 3 Burr. 1434.

(*d*) See *R. v. Mackarty and Fordenborough*, 2 Ld. Raym. 1179; 2 East, P. C. c. 18, s. 5; 6 East, 133.

(*e*) See *R. v. De Beranger*, 3 M. & S. 67.

(*f*) See *Queen v. Gompertz and others*, 9 Q. B. 824.

the like (*g*). But one of the chief species of this offence, (and that which reduces it under the present chapter,) is that of conspiring [to indict an innocent man falsely and maliciously; who is accordingly indicted and acquitted,] or otherwise lawfully discharged from the prosecution (*h*). This is [an abuse and perversion of public justice; for which the party injured may either have a civil action,—the nature of which we have described in a former book (*i*); or else the conspirators, (for there must be at least two to form a conspiracy,) may be indicted at the suit of the Crown (*k*); and (being convicted) were by the antient common law to receive what was called the villenous judgment (*l*): viz., to lose their *liberam legem*,] whereby they were formerly discredited and disabled as jurors and witnesses; [to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison (*m*). But it is now the better opinion that the villenous judgment is by long disuse become obsolete, it not having been pronounced for some ages (*n*); but instead thereof, the defendants are usually sentenced] to fine and imprisonment (*o*); to which, by 14 & 15 Vict. c. 100, s. 29, may now be added, (in most cases of conspiracy,) hard labour, during the whole or any part of the term of imprisonment.

(*g*) Hawk. P. C. b. 1, c. 72, s. 2.

(*h*) Hawk. ubi sup. et s. 9; 3 Inst. 143; see *R. v. Spragg*, 2 Burr. 998; *R. v. Macdaniel*, 1 Leach, C. C. 45. As to the *felonious* offence of actually accusing or actually threatening to accuse of crime, with intent to extort property, vide sup. pp. 212, 213.

(*i*) Vide sup. vol. III. p. 497.

(*k*) No indictment for a conspiracy shall be presented to or found by the grand jury, without security given for the due prosecution of the charge, unless the indictment be ordered by a judge, &c. (22 & 23 Vict. c. 17.)

(*l*) Bro. Abr. tit. Conspiracy, 28.

(*m*) Hawk. P. C. b. 1, c. 72, s. 9.

(*n*) It is to be observed in reference to this subject, that until a recent period persons who were *infamous*, that is, of such a character that they might be challenged as jurors *propter delictum* (as to which vide sup. vol. III. p. 627), were, independently of any villenous judgment, inadmissible as witnesses. But they are now made competent by 6 & 7 Vict. c. 85. Vide sup. vol. III. p. 634.

(*o*) Blackstone adds "pillory," but this punishment is now abolished. Vide post, p. 324, n. (*o*).

We may add that, with regard to a conspiracy, the object of which is to commit *murder*, there is a recent provision as to such offence contained in 24 & 25 Vict. c. 100, by which it is enacted, that all persons who shall conspire, confederate and agree to murder any person, (whether a subject of her majesty or not, and whether within her dominions or not,) and whosoever shall solicit, encourage, persuade or endeavour to persuade, or shall propose to any person, to murder any other person,—shall be guilty of a misdemeanor, and be punishable either by imprisonment (with or without hard labour) to the extent of two years; or, at the discretion of the court, by *penal servitude*, to the extent of ten years or not less than three years (*p*).

With respect to the offence of conspiracy, it may be remarked, that it is deemed to consist rather in the guilty combination or agreement, than in the act by which it is carried into effect: and therefore, in an indictment for conspiring to do a thing in itself unlawful, it is not necessary to allege that the thing was in fact done (*q*); though, supposing it to have been done, it is usual to state the unlawful agreement or conspiracy first, and then to charge the thing done, (or overt act, as it is called,) to have been committed in pursuance of the conspiracy (*r*). It is also observable, that the effect of the state of the law relative to conspiracy, is often to render a purpose criminal when concerted by several, which would not be of that character, if entertained merely by an individual; a distinction which rests on very solid ground; for though every wrong may not be of dangerous tendency to the public, yet every coalition to promote wrong, is manifestly of that character. Accordingly it is held, that a false and malicious indictment, if preferred by an individual, is no crime, though it

(*p*) 24 & 25 Vict. c. 100, s. 4. The offender, if the court see fit, may also, either in addition to or in lieu of any other punishment, be bound over with sureties to keep the peace and be of good behaviour. (Sect. 71.)

(*q*) See 9 Rep. 56 b; *R. v. Kimberty*, 1 Lev. 62; *R. v. Best*, Lord Raym. 1167; *S. C. Salk*. 174; *R. v. Seward*, 1 A. & E. 713.

(*r*) As to the form of the indictment, see *R. v. Steel*, 1 C. & M. 337.

is a cause of civil action (*s*); but if planned by several persons, it is, as we have seen, the legal offence of conspiracy. So a combination among workmen, to raise the price of wages, was once deemed to be, in every case, conspiracy (*t*); though the same object, if contemplated by a single workman, would not have been criminal (*u*). But the law on this subject is now altered; for by 6 Geo. IV. c. 129, s. 4, and 22 Vict. c. 34, persons merely entering into agreement for the purpose of fixing the rate of wages, or endeavouring (without threat or intimidation) to persuade others to abstain from work for the same purpose, are not therefore to be liable to prosecution, or indictment for conspiracy. As to an assault in pursuance of an unlawful combination or conspiracy to raise wages,—or respecting any trade, business, or manufacture, or any person concerned or employed therein,—it is by 24 & 25 Vict. c. 100, s. 41, made a misdemeanor punishable with imprisonment for any term not exceeding two years with or without hard labour.

XV. The next offence against public justice is that of *perjury*; which is defined by Sir E. Coke (*x*) “to be
“ a crime committed, when a lawful oath is ministered by
“ any that hath authority, to any person, in any judicial
“ proceeding, who sweareth absolutely and falsely, in a
“ matter material to the issue or cause in question.”
The common law [takes no notice of any perjury, but such as is committed in some court of justice having power to administer an oath (or before some magistrate, or proper officer, invested with a similar authority) in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary at least,

(*s*) *Leith v. Pope*, 2 Bl. Rep. Ald. 527.

1328; see 2 Russ. on Crimes, p. 674.

(*u*) *R. v. Tailors of Cambridge*, 8 Mod. 10.

(*t*) See *R. v. Ridgeway*, 5 B. & (*x*) 3 Inst. 164.

[and therefore will not punish the breach of them.] But by the express provision of many modern statutes (z), it is enacted that a false oath taken in certain cases, not of a judicial kind, shall be deemed to amount to perjury, and be visited with the same penalties (a).

A mere voluntary oath, however,—that is, an oath administered in a case for which the law has not provided, —is not one on which perjury can be assigned; for as such a proceeding is not required, so neither is it protected by the law. Indeed, such voluntary oaths are now expressly prohibited by statute 5 & 6 Will. IV. c. 62, which provides, that a certain form of declaration may be substituted for them, and that any party falsely making such declaration shall be guilty of a misdemeanor.

Perjury, by the definition, must be *absolute*, as well as false,—that is, it must be in positive terms. Yet a man will be guilty of the offence, if he swears he believes to be true a fact or statement which he knows to be false (b). Perjury must also be *corrupt* or *wilful*, (that is, committed

(z) Among the statutes containing provisions as to perjury in particular cases, are the following: Annuities (Government), 48 Geo. 3. c. 142, ss. 4, 26; 52 Geo. 3, c. 129, ss. 2, 7;—Bankrupts, 12 & 13 Vict. c. 106, s. 254;—Court for Divorce and Matrimonial Causes, 20 & 21 Vict. c. 89, s. 90;—Court of Probate, &c., 20 & 21 Vict. c. 77, s. 27;—Elections, 2 Will. 4, c. 45, s. 58; 5 & 6 Will. 4, c. 76, s. 34;—Exchequer Bills, 51 Geo. 3, c. 15, ss. 9, 10;—Excise, 7 & 8 Geo. 4, c. 53, ss. 29, 30, 31;—Inclosure Act, 41 Geo. 3, c. 109, s. 43;—Naval and Military Pay, 11 Geo. 4 & 1 Will. 4, c. 20, ss. 85, 86;—Oaths sworn abroad, 6 Geo. 4, c. 87; 18 & 19 Vict. c. 42;—Quarantine, 6 Geo. 4,

c. 78, s. 29;—Registry Acts, 2 & 3 Ann. c. 4, ss. 18, 19;—Slave trade, 5 & 6 Vict. c. 42, s. 7;—Stamps, 55 Geo. 3, c. 184, ss. 52, 53.

(a) We may remark here, that the penalties of perjury attach to wilful falsehood in an *affirmation* by a *Quaker*, *Moravian*, or *Separatist*. (As to which, vide sup. vol. II. p. 353.) They also attach to the affirmation of a *witness* (on oral examination or otherwise) in lieu of taking an oath, under 17 & 18 Vict. c. 125, s. 20, and 24 & 25 Vict. c. 66. (Vide sup. vol. III. p. 635.) And the case is the same as to the *declaration of a bankrupt*, without oath. (See 12 & 13 Vict. c. 106, s. 254.)

(b) Pedley's case, 1 Leach, C. C. 365.

malo animo,) not upon surprise or the like (c). [It must also be, in some point, *material* to the question in dispute (d); for if it only be in some trifling collateral circumstance to which no regard is paid,] it is no more penal than in the voluntary extra-judicial oaths before mentioned.

[*Subornation* of perjury, is the offence of procuring another to take such a false oath, as constitutes perjury in the principal (e).]

Perjury and subornation are both misdemeanors (f); and their punishment, [at common law, has been various. It was antiently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and, latterly, fine and imprisonment.] But additional punishments for this offence, have been enacted by various statutes. By 5 Eliz. c. 9, (made perpetual by 29 Eliz. c. 5, s. 2, and 21 Jac. I. c. 28, s. 8,) an offender, convicted of perjury, may be imprisoned for six months and fined 20*l*.; and if convicted of subornation, may be fined 40*l*., and, in default of payment, is liable to the same period of imprisonment. Moreover, under 2 Geo. II. c. 25, the perjurer or suborner may be sent to the house of correction, with hard labour, for seven years; or (under the same statute as affected in its punishment by later Acts), they may be sentenced to penal servitude for not more than seven or less than three years (g). And by 3 Geo. IV. c. 114, such offenders may be sentenced to *hard labour* for any term for which they

(c) Hawk. P. C. b. 1, c. 69, s. 2.

(d) *R. v. Aylett*, 1 T. R. 69; and see *Queen v. Bennett*, 20 L. J. (M. C.) 217; *Queen v. Phillpotts*, 21 L. J. (M. C.) 18.

(e) If the party suborned does not actually take an oath, the person inciting him so to do, is still liable to be fined and suffer infamous corporal punishment. (*Hawk. P. C. b. 1, c. 69, s. 2.*)

(f) As to the indictment and trial

of perjury and subornation, vide post, c. xviii. By 22 & 23 Vict. c. 17, an indictment for neither of them is to be preferred to, or found by, the grand jury, without security given for the due prosecution of the charge, unless the party charged have been bound over to meet it, or indictment be preferred by direction or consent of a judge, &c.

(g) 2 Geo. 2, c. 25, s. 2; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

may be imprisoned; and that, either in addition to or in lieu of any other punishment (*h*).

[It has been sometimes wished that perjury, at least upon capital accusations, whereby another's life has been or might have been destroyed, was also rendered capital, upon a principle of retaliation (*l*).] And, indeed, [where the death of an innocent person has been actually the consequence of such wilful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment; which, it has been said, our ancient law in fact inflicted (*m*). But the mere *attempt* to destroy life, by other means, not being capital, there is no reason that an attempt by perjury should; much less, that this crime should in *all* judicial cases be punished with death (*n*). For to multiply capital punishments lessens their effect, when applied to crimes of the deepest dye; and detestable as perjury is, it is not by any means to be compared with some other offences, for which only death can be inflicted: and therefore it seems already, (except perhaps in the instance of deliberate murder by perjury,) very properly punished by our present law; which has adopted the opinion of Cicero derived from the law of the Twelve Tables, "*perjurii pœna divina, exitium; humana, dedecus* (*o*)."]

XVI. *Bribery*, is the next species of offence against public justice; which is when a judge, or other person

(*h*) By 14 & 15 Vict. c. 100, s. 19, any court has, in general, the power of directing any witness to be prosecuted for perjury, in regard to the evidence he has given.

(*l*) Blackstone adds (vol. iv. p. 138), "as it is in all cases by the laws of France."

(*m*) Britton, c. 5. Vide sup. p. 152, n. (*z*).

(*n*) As to attempts to murder, vide sup. p. 161.

(*o*) De Leg. 2, 9. Until recently the punishment of the *pillory*, which

had been abolished in all other cases by 56 Geo. 3, c. 138, was retained for the punishment of perjury and subornation. But it is now altogether abolished by 7 Will. 4 & 1 Vict. c. 23. Another consequence that attended a conviction for this crime, until a recent period, was a perpetual disability to bear testimony. But by statute 6 & 7 Vict. c. 85, the law with respect to the incompetency of witnesses, on the ground of crime, is altered. Vide sup. vol. III. p. 634.

concerned in the administration of justice, takes any undue reward to influence his behaviour in his office (*p*). [In the East, it is the custom never to petition any superior for justice, not excepting their kings, without a present. This is calculated for the genius of despotic countries, where the true principles of government are never understood; and it is imagined that there is no obligation from the superior to the inferior; no relative duty owing from the governor to the governed. The Roman law, though it contained many severe injunctions against bribery,—as well for selling a man's vote in the senate or other public assembly, as for the bartering of common justice;—yet, by a strange indulgence in one instance, it tacitly encouraged this practice; as it allowed the magistrate to receive small presents, provided they did not in the whole exceed one hundred crowns in a year (*q*),—not considering the insinuating nature and gigantic progress of this vice when once admitted. Plato, therefore, more wisely, in his ideal republic, orders those who take presents for doing their duty, to be punished in the severest manner (*r*); and by the laws of Athens, he that offered was also prosecuted, as well as he that received a bribe (*s*). In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same (*t*). But in judges, especially the superior ones, it hath been always looked upon] as particularly heinous; and there is even a tradition that in the reign of Edward III. chief justice Thorpe was hanged for this offence (*u*). [By a statute of the eleventh year of

(*p*) 3 Inst. 145; Hawk. P. C. b. 1, c. 67.

(*q*) Ff. 48, 11, 6.

(*r*) De Leg. l. 12.

(*s*) Pott. Antiq. b. 1, c. 23*

(*t*) 3 Inst. 147.

(*u*) Blackstone (vol. iv. p. 140) says he was actually hanged; but Lord Coke (3 Inst. 145) denies that Thorpe was hanged, or could be hanged, for this offence; and Lord

Campbell, in his Lives of the Chief Justices (vol. i. p. 91), considers the tradition, that sentence of death was actually passed on him, to be unfounded; and to have been invented by Oliver St. John in inveighing against the judges who, in the reign of Charles I., decided in favour of the legality of ship-money.

[Henry the fourth, all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe; be punished at the king's will; and be discharged from the king's service for ever (x). And some notable examples have been made in parliament, of persons in the highest stations, and otherwise very eminent and able, but contaminated with this sordid vice (y).]

XVII. [Another misdemeanor of the same species, is the *negligence of public officers* intrusted with the administration of justice,—as sheriffs, coroners, constables, and the like,—which makes the offender liable to be fined: and, in very notorious cases, will amount to a forfeiture of his office, if it be a beneficial one (z).]

XVIII. [There is yet another offence against public justice, which is a] misdemeanor [of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the *oppression*, and *tyrannical partiality*, of judges, justices, and other magistrates, in the administration and under the colour of their office. However, when prosecuted,—either by impeachment in parliament, or by information in the Court of Queen's Bench, (according to the rank of the offenders,) it is sure to be severely punished with forfeiture of their offices, (either consequential or immediate); together with fines, imprisonment, or other discretionary censure, regulated by the nature and aggravations of the offence committed (a).]

(x) See 3 Inst. 147.

(y) As to the offence of bribery and corruption at *parliamentary elections*, vide sup. vol. 11. p. 390. As to bribery in *municipal elections*, see 5 & 6 Will. 4, c. 76, s. 54. As to bribery of *custom house officers*, see 16 & 17 Vict. c. 107, s. 262; of *excise officers*, 7 & 8 Geo. 4, c. 53, s. 12. As to bribery of officers of the Court

of Chancery, see 3 & 4 Will. 4, c. 94, s. 41. As to bribery of *public officers in the East Indies*, see 33 Geo. 3, c. 52, s. 4.

(z) Hawk. P. C. b. 1, c. 66; and see R. v. Pinney, 3 B. & Ad. 946; R. v. Neale, 9 Car. & P. 431.

(a) Hawk. P. C. b. 1, c. 68; and see R. v. Holland, 5 T. R. 607.

XIX. [Lastly, *extortion* is an abuse of public justice; which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due.] The punishment for this misdemeanor [is fine and imprisonment, and sometimes a forfeiture of the office(*b*).]

† (*b*) See 3 Edw. 1, c. 26; 3 Inst. 145; R. v. Gilham, 6 T. R. 235; R. v. Jones, 2 Camp. 131. As to extortion by British subjects in the East Indies, in receiving gifts, see 33 Geo. 3, c. 52, s. 62; Re Capt. Douglas, 3 Q. B. 825; Douglas v. Queen, 13 Q. B. 74. By 1 & 2

Will. 4, c. 56, any judge or other officer in *Bankruptcy*, taking other than his lawful fees shall forfeit 500*l.*, and be incapable of holding office. And see on the subject of extortion in general, Bac. Abr. tit. Fees; Jac. L. Dict. Extortion, &c.

CHAPTER X.

OF OFFENCES AGAINST THE PUBLIC PEACE.



WE are next to consider offences against the public peace (a); in our consideration of which, however, it is to be understood, that those are passed over which more immediately and properly range themselves under other divisions of the work,—such as offences against the person and the like. Those at present in question, are of two sorts; amounting either to actual breaches of the peace, or only to acts provocative of a breach of the peace by others. Actual breaches of the peace are also either felonious, or not felonious. [The felonious breaches of the peace are strained up to that degree of malignity, by virtue of several modern statutes; and particularly,

I. *The riotous assembling of twelve persons or more, and not dispersing upon proclamation.* This was first made treason by statute 3 & 4 Edw. VI. c. 5; when the king was a minor, and a change of religion to be effected. But that statute was repealed by the first Act of Queen Mary, among the other treasons created since the twenty-fifth year of Edward the third; though the prohibition was in substance re-enacted, with an inferior degree of punishment, by statute 1 Mar. st. 2, c. 12; which made the same offence a single felony. These statutes specified, and particularized, the nature of the riots they were meant to suppress; as, for example, such as were set on foot with

(a) At a former place we remarked, after Blackstone, that crimes “almost always include a breach of the public peace” (vide

sup. p. 131), but the crimes spoken of in this chapter, are those which are directed more particularly against the public peace.

[intention to offer violence to the Privy Council; or to change the laws of the kingdom; or for certain other specific purposes. In which cases, if the persons were commanded by proclamation to disperse, and they did not, it was by the statute of Mary made felony, but within the benefit of clergy; and also the Act indemnified the peace officers and their assistants, if they killed any of the mob in endeavouring to suppress such riot. This was thought a necessary security in that sanguinary reign; when popery was intended to be established, which was like to produce great discontents: but at first it was made only for a year, and was afterwards continued for that queen's life. And by statute 1 Eliz. c. 16, when a reformation in religion was to be once more attempted, it was revived and continued during her life also; and then expired. From the accession of James the first to the death of Queen Anne, it was never once thought expedient to revive it; but in the first year of George the first, it was judged necessary, in order to support the execution of the Act of Settlement, to renew it; and at one stroke to make it perpetual, with large additions. For whereas the former Acts expressly defined and specified what should be accounted a riot, the statute 1 Geo. I. st. 2, c. 5,] commonly called "the Riot Act," [enacts generally, that if any twelve persons are unlawfully assembled to the disturbance of the peace; and any one justice of the peace, sheriff, undersheriff or mayor of a town, shall think proper to command them by proclamation to disperse,—if they contemn his orders, and continue together for one hour afterwards, such contempt shall be felony:] and the punishment is penal servitude for life, or not less than three years; or imprisonment, with or without hard labour or solitary confinement, for not more than two years (*b*). And the Riot Act declares further, that if the reading of the proclamation be by force opposed, or the reader be in any manner

(*b*) 1 Geo. 1, st. 2, c. 5; 7 Will. 4 16 & 17 Vict. c. 99; 20 & 21 Vict. & 1 Vict. c. 91; 9 & 10 Vict. c. 24; c. 3.

[wilfully hindered from the reading of it, such opposers and hinderers, and all persons to whom such proclamation *ought to have been made*, and knowing of such hindrance, and not dispersing, are felons:] and they are liable to the like punishment (*c*). The Riot Act also [contains a clause indemnifying the officers and their assistants in case any of the mob be unfortunately killed in the endeavour to disperse them;]—such clause [being copied from the Act of Queen Mary (*d*)]

II. *Riotously demolishing churches, houses, buildings or machinery.* By 24 & 25 Vict. c. 97, if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy (or begin to demolish, pull down, or destroy) any *church*, chapel, meeting-house, or other place of divine worship; or any *house*, stable, or other such buildings, engines, or machinery as in the Act mentioned,—every such offender shall be guilty of felony: and he is liable to penal servitude for life, or any term not less than three years; or to be imprisoned with or without hard labour, for any term not more than two years (*e*).

And by 7 & 8 Geo. IV. c. 31, ss. 2, 3, if any church, chapel, house, or such buildings or machinery as in that Act mentioned, shall be feloniously demolished, (wholly or in part,) by persons riotously and tumultuously assembled together, the inhabitants of the hundred shall be liable to

(*c*) 1 Geo. 1, st. 2, c. 5; 7 Will. 4 & 1 Vict. c. 91; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*d*) Provisions were also contained in 1 Geo. 1, c. 5, against the riotous destruction of churches and other places of religious worship, making such offences capital felonies; but these enactments were repealed by 7 & 8 Geo. 4, c. 27; and the offence

of riotous demolition generally, otherwise provided against by 7 & 8 Geo. 4, c. 30, s. 8. This last provision is repealed by 24 & 25 Vict. c. 95, but re-enacted by that which is given in the text.

(*e*) 24 & 25 Vict. c. 97, s. 11. The offenders, if the court think fit, may also be bound over with sureties to keep the peace. (Sect. 73.)

yield full compensation ; provided that the persons damaged, or such of them as have knowledge of the circumstances, or the servants who had the care of the property, shall, within seven days, go before some justice of the peace, residing near and having jurisdiction ; and state upon oath the names of the offenders, if known ; and submit to examination touching the circumstances ; and become bound, by recognizance, to prosecute : and provided also, that an action against the hundred, be commenced within three calendar months after the offence (*f*).

III. By 24 & 25 Vict. c. 100, s. 16, whosoever shall maliciously send, deliver or utter, or directly or indirectly cause to be received, knowing the contents thereof, any *letter or writing threatening to kill or murder any person*, shall be guilty of felony and punishable by penal servitude for ten years, or not less than three ; or by imprisonment with or without hard labour and solitary confinement to the extent of two years, and with whipping if the court thinks fit and the offender be a male under the age of sixteen years (*g*).

This offence was formerly *treason*, by the statute 8 Hen. VI. c. 6 ; which provision, however, was repealed by the effect of 1 Edw. VI. c. 12.

The above mentioned offences comprise such breaches of the public peace as amount to felony. The remainder are of a lighter character.

(*f*) When the damage caused by the demolition or attempted demolition does not exceed 30*l*. the statute (7 & 8 Geo. 4, c. 31, s. 8,) gives, instead of an action, a summary proceeding before justices at a special petty session. By 2 & 3 Will. 4, c. 72, the provisions of 7 & 8 Geo. 4, c. 31, on this subject are extended to the damage or destruction of *threshing machines* : and by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 47, to

the plunder, damage or destruction of *ships or boats* stranded or in distress.

(*g*) The former provisions on this subject, contained in 9 Geo. 1, c. 22, and 27 Geo. 2, c. 15, were repealed by 4 Geo. 4, c. 54, s. 3, which was itself repealed by 24 & 25 Vict. c. 95. It may be observed, that the offender, on conviction, may also, if the court see fit, be bound over with sureties to keep the peace. (24 & 25 Vict. c. 100, s. 73.)

IV. [*Affrays*, (from *affraier*, to terrify,) are the fighting of two or more persons in some public place (*l*), to the terror of her majesty's subjects; for if the fighting be in private it is no *affray*, but an *assault* (*m*).] Affrays are misdemeanors; and [may be suppressed by any private person present: who is justifiable in endeavouring to part the combatants, whatever consequences may ensue (*n*). But more especially the constable or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers: and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over (*o*). The punishment of *common* affrays, is by fine and imprisonment: the measure of which must be regulated by the circumstances of the case: for where there is any material aggravation, the punishment proportionably increases. As where two persons coolly and deliberately engage in a duel (*p*); this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray,] and may even amount to felony under 24 & 25 Vict. c. 100, s. 14, though no mischief has actually ensued (*q*). [Another aggravation is, when thereby the officers of justice are disturbed in the due execution of their office; or where a respect to the particular place, ought to restrain and regulate men's behaviour more than in common ones; as in the court of the sovereign, and the like (*r*). And

(*l*) As in the case of a prize fight or other pugilistic combat. 1 East, P. C. c. 5, s. 41; R. v. Bellingham, 2 C. & P. 234; Hawk. P. C. b. 1, c. 63, s. 2.

(*m*) Hawk. P. C. ubi sup.

(*n*) Hawk. P. C. b. 1, c. 63, s. 13.

(*o*) Ibid. It seems that a constable has no power to arrest without warrant, for an *affray* committed out of his own presence. See Cook

v. Nethercote, 6 C. & P. 741; Fox v. Gaunt, 3 B. & Ad. 798; R. v. Curvan, R. & M. C. C. R. 132; R. v. Bright, 4 C. & P. 387.

(*p*) Hawk. P. C. b. 1, c. 63, s. 21.

(*q*) Vide sup. p. 162.

(*r*) Hawk. P. C. b. 1, c. 21, ss. 6, 10; c. 63, s. 23. As to striking and other outrage in the king's courts, &c., vide sup. p. 304.

[upon the same account also, all affrays in a church or churchyard are esteemed very heinous offences; as being indignities to Him to whose service those places are consecrated. Therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by statute 5 & 6 Edw. VI. c. 4 (*s*), that if any person shall—by words only—quarrel, chide, or brawl in a church or churchyard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiæ*; and, if a clerk in orders, from the ministration of his office during pleasure (*t*): and if any person in such church or churchyard proceeds to smite (*u*) or lay violent hands upon another, he shall be excommunicated *ipso facto* (*v*).] And though these enactments are now, by 23 & 24 Vict. c. 32, s. 5, repealed as to brawling by a person not in holy orders, yet they are in other respects in force (*w*). [Two persons may be guilty of an affray;] but

V. [*Riots, routs, and unlawful assemblies*,] (all of which are misdemeanors (*x*),) [must have three persons at least to constitute them.] 1. A *riot*, seems to be a tumultuous disturbance of the peace by three persons, or more; assembling together of their own authority, with an intent mutually to assist one another, against any who shall op-

(*s*) See also 1 W. & M. st. 1, c. 18, s. 18.

(*t*) As to this statute, see *Cox v. Goodday*, 2 Hagg. R. 139.

(*u*) Further provisions were made, by this statute, for the case of weapons being used or drawn in churches, &c.; but these were repealed by 9 Geo. 4, c. 31, s. 1.

(*v*) As to excommunication, vide sup. vol. III. p. 451. As to disturbing a congregation during divine service, vide sup. vol. III. p. 42.

(*w*) The 23 & 24 Vict. c. 32, also imposes a penalty to the extent of

5*l.*, (or imprisonment to the extent of two months,) on the offence of riotous, violent, or indecent behaviour by any person in any church or place of worship, or in any churchyard or burial-ground; and also on the offence of molesting, troubling, misusing, &c., any authorized preacher, or clergyman in holy orders, in his celebration of any divine service or office in any church, &c.

(*x*) Hawk. P. C. b. 1, c. 65; 1 Russ. 288.

pose them, in the execution of some enterprise of a private nature; and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people,—whether the act intended were of itself lawful or unlawful (*y*). 2. A *riot*, seems to be a disturbance of the peace by persons assembling together with an intention to do a thing which, if it be executed, will make them rioters, and actually making a motion towards the execution thereof (*z*). 3. An *unlawful assembly*, seems to consist of any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the subjects of the realm (*a*). The punishment of such riots as (the persons assembled not amounting to twelve or more) fall not under the Riot Act before referred to, is fine and imprisonment (*b*); to which hard labour may, (by 3 Geo. 4, c. 114,) be superadded. The same punishment, but without this addition, attaches to the offences of riots and unlawful assemblies. [By the stat. 13 Hen. IV. c. 7, moreover, any two justices, together with the sheriff or undersheriff of the county, may come with the *posse comitatus*, (if need be,) and suppress any such riot, assembly, or rout; arrest the rioters; and record, upon the spot, the nature and circumstances of the whole transaction: which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it hath been holden, that all persons, noblemen and others, (except women, clergymen, persons decrepit, and infants under fifteen,) are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment (*c*); and that any battery, wounding, or killing the rioters, that may happen in suppressing the

(*y*) Hawk. P. C. b. 1, c. 66, s. 1;
and see Cox v. Goodday, ubi sup.;
2 Hagg. R. 139.

(*z*) Hawk. P. C. b. 1, c. 65, s. 8.

(*a*) Ib. s. 9; and see 57 Geo. 3,
c. 19, s. 23; post, p. 335.

(*b*) As to the Riot Act, vide sup.
p. 329.

(*c*) See R. v. Pinney, 3 B. & Ad.
946; R. v. Neale, 9 C. & P. 431;
R. v. Brown, 1 Car. & M. 315.

[riot, is justifiable (*d*). So that our antient law, previous to the modern Riot Act, seems pretty well to have guarded against any violent breach of the public peace; especially as any riotous assembly on a public or general account,—as to redress grievances, or to pull down all inclosures,—and also resisting the Royal forces if sent to keep the peace, may amount to overt acts of treason by levying war against the sovereign (*e*).]

VI. Nearly related to this head of riots is the misdemeanor [of *tumultuous petitioning*; which was carried to an enormous height, in the times preceding the grand rebellion. Wherefore by statute 13 Car. II. st. 1, c. 5, it is enacted, that not more than twenty names shall be signed to any petition to the Crown or either house of parliament for any alteration of matters established by law in Church or State: unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assizes or quarter sessions; and, in London, by the lord mayor, aldermen, and common council (*f*): and that no petition shall be delivered by a company of more than ten persons. On pain, in either case, of incurring a penalty not exceeding 100*l.* and three months' imprisonment (*g*).]

And further, it is provided by 57 Geo. III. c. 19, s. 23, that it shall not be lawful for any person to convene, or give notice of convening, any meeting consisting of more than fifty persons; or for any number of persons exceeding the number of fifty to meet in any street, square, or open space in the city or liberties of Westminster or county of Middlesex, within the distance of a mile from the gate of Westminster Hall, except such parts of the parish of St.

(*d*) 1 Hale, P. C. 495; Hawk. P. C. b. 1, §. 65, s. 20.

(*e*) Vide sup. p. 240.

(*f*) This may be one reason, says Blackstone (vol. iv. p. 147), among others, why the corporation of Lon-

don has, since the Restoration, usually taken the lead in petitions to parliament for the alterations of any established law.

(*g*) As to this statute, see *R. v. Gordon*, Dougl. Rep. 592.

Paul's, Covent Garden, as are within such distance—for the purpose of considering of or preparing any petition, complaint, remonstrance, declaration or other address, to both or either house of parliament for alteration of matters in Church or State,—on any day on which the two houses or either house of parliament shall meet and sit, or shall be summoned or adjourned or prorogued to meet or sit, nor on any day on which the courts shall sit in Westminster Hall. And any such meeting is by the Act made an *unlawful assembly* (*h*). But there is a provision that the enactment shall not apply to any meeting for the election of members to serve in parliament, or to persons attending upon the business of either house of parliament, or any of the said courts (*i*).

VII. [A seventh offence against the public peace is that of a *forcible entry* or *detainer*; which is committed by violently taking,—or,] after an unlawful taking, violently [keeping possession of—lands and tenements, with menaces, force and arms, and without the authority of law (*k*).] A forcible entry [was formerly allowable to every person disseised or turned out of possession, unless his entry was taken away or barred by his own neglect or other circumstances;] but it is now,—as well as a forcible detainer,—a misdemeanor, punishable by imprisonment and ransom, at the pleasure of the Crown (*l*). And on this offence it will be unnecessary on the present occasion to say more, the subject having already sufficiently attracted our attention in a former volume (*m*).

(*h*) As to what this term imports, vide sup. p. 334.

(*i*) The other enactments contained in this Act, and in 60 Geo. 3 & 1 Geo. 4, c. 6, as to assemblies of persons collected under pretext of public grievances, &c., appear to have been only temporary, and to be now expired. (1 Russ. on Crimes,

p. 280.)

(*k*) See *R. v. Oakley*, 4 Barn. & Adol. 30; *R. v. Wilson*, 3 Ad. & El. 817; 1 Russ. on Crimes, p. 340.

(*l*) See the statutes 5 Ric. 2, st. 1, c. 8; 15 Ric. 2, c. 2; 8 Hen. 6. c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15.

(*m*) Vide sup. vol. III. p. 354.

VIII. [The offence of *riding or going armed with dangerous or unusual weapons*] is a misdemeanor, tending to disturb the public peace, [by terrifying the good people of the land; and is particularly prohibited by the Statute of Northampton, (2 Edw. III. c. 3,) upon pain of forfeiture of the arms, and imprisonment during the pleasure of the Crown; in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour (n).]

IX. [*Spreading false news*, to make discord between the sovereign and nobility, or concerning any great man of the realm, is] also a misdemeanor, punishable by common law with fine and imprisonment (o): which is confirmed by statutes Westminster the first, (3 Edw. I. c. 34); 2 Ric. II. st. 1, c. 5; and 12 Ric. II. c. 11.

X. [*False and pretended prophecies*, with intent to disturb the peace, are equally unlawful and more penal, as they raise enthusiastic jealousies in the people, and terrify them with imaginary fears. They are, therefore, punished by our law] as misdemeanors; and that, [upon the same principle that spreading of public news of any kind, without communicating it first to the magistrate, was prohibited by the antient Gauls (p). Such false and pretended prophecies were punished capitally] by 33 Hen. VIII. c. 14; which was however altered by the temporary Acts of 3 & 4 Edw. VI. c. 15, and 7 Edw. VI. c. 11 (q): [and now by the statute 5 Eliz. c. 15, the penalty for the first offence is a fine of ten pounds and one year's imprisonment; for the

(n) Pott. Antiq. b. 1, c. 26.

(o) 2 Inst. 226; 3 Inst. 198.

(p) "*Ilabent legibus sanctum, si quis quid de republicâ a finitimis rumore aut famâ acceperit, uti ad magistratum deferat, neve cum alio communicet; quod sæpe homines temerarios atque imperitos falsis rumoribus ter-*

rerî, et ad facinus impelli, et de summis rebus consilium capere, cognitum est."—Cæs. de Bell. Gall. lib. 6, cap. 19.

(q) See Coleridge's Blackstone (vol. iv. p. 149), in *notis*, where Blackstone's statement on this subject is corrected.

[second, forfeiture of all goods and chattels and imprisonment during life.]

XI. [Besides actual breaches of the peace, any thing that tends to provoke or incite others to break it, is an offence of the same denomination. Therefore, *challenges to fight*, either by word or letter, or to be the bearer of such challenges, are] misdemeanors, [punishable by fine and imprisonment, according to the circumstances of the offence (*r*).]

XII. Another kind of misdemeanor, amounting in many instances to an incitement to break the peace, is the *publication of a libel*. Of *defamatory libels* we have already said so much in a former part of the work, as to preclude the necessity for any copious discussion of them on the present occasion(*s*). It may be right, however, to remark in this place, that by the provisions of 6 & 7 Vict. c. 96(*t*), it is enacted, that if any person shall publish or threaten to publish any libel, or directly or indirectly propose to abstain from printing or publishing, or offer to prevent the printing or publishing, of any matter touching any person, with intent to extort any money, security for money, or valuable thing from such person or any other; or with intent to induce any person to confer or procure any appointment or office of profit or trust;—he shall be liable to imprisonment, with or without hard labour, for a term not exceeding three years(*u*). Also, that if any person shall maliciously publish any defamatory libel, knowing the same to be false, he shall be imprisoned for a term not exceeding two years, and pay such fine as the court shall award(*v*). And that if any person (though without such knowledge) shall maliciously publish any defamatory libel,

(*r*) Hawk. P. C. b. 1, c. 63, ss. 3, 21.

(*s*) Vide sup. vol. II. p. 38; vol. III. p. 494.

(*t*) This Act is amended by 8 & 9 Vict. c. 75.

(*u*) 6 & 7 Vict. c. 96, s. 3.

(*v*) Sect. 4.

he shall be liable to fine or imprisonment, or both, as the court shall award, such imprisonment not to exceed one year (*w*).

It is also necessary to observe, that besides defamatory libels, the term of libel legally includes such writings as are of a blasphemous, treasonable, seditious, or immoral kind; the publication of any of which is equally a misdemeanor (*x*), and subjects the person by whom it was composed, written, printed or published, to fine and imprisonment. And by 60 Geo. III. & 1 Geo. IV. c. 9, s. 16, it is enacted, that if a person charged with printing or publishing any blasphemous, seditious, or malicious libel, be brought up to give bail,—the court, judge, or justice of the peace, before whom he is so brought, may make it part of the condition of the recognizance that he shall be of good behaviour during the continuance of the recognizance. And by cap. 8, of the same session, it is also provided, as to libels of a blasphemous or seditious kind, that in every case in which any verdict or judgment by default shall be had against any person for composing, printing, or publishing the same,—the judge or court before whom such verdict shall have been given, may order the seizure and detaining of all copies thereof, which shall be in the possession of the person against whom such verdict was given; or in the possession of any other person, for his use. And upon proper evidence being given of such possession, it shall be lawful for any justice of the peace, constable, or other peace officer, acting under such order, to search for such copies in any house or other building or place belonging to the person who shall be named in such order: and to enter (in the day time), by force, if admission be refused or unreasonably delayed (*y*).

The offence of libel was treated at certain periods,

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|---|--|
| <p>(<i>w</i>) 6 & 7 Vict. c. 96, s. 5.
 (<i>x</i>) See 4 Bl. Com. p. 451, note by Christian.
 (<i>y</i>) A second offence in publish-</p> | <p>ing a seditious or blasphemous libel, was by this statute made punishable with banishment; but this was repealed by 11 Geo. 4 & 1 Will. 4, c. 73.</p> |
|---|--|

under the Roman law, with more severity. [By the law of the Twelve Tables, libels, which affected the reputation of another, were made a capital offence; but before the reign of Augustus, the punishment became corporal only (*z*). Under the Emperor Valentinian it was again made capital not only to write but to publish, or even to omit to destroy them (*a*). But our law, in this and many other respects, corresponds rather with the middle age of Roman jurisprudence, when liberty, learning and humanity were in their full vigour;] and exhibits a moderation sufficient to protect it from any imputation of infringing the *liberty of the press*. This liberty, when rightly understood, [consists in laying no *previous* restraints upon publications; and not in freedom from censure for criminal matter, when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution (*b*), is to subject all freedom of senti-

(*z*) ————— “*Quinetiam lex Poenaeque lata, malo quæ nollet carmine quenquam*

Describi:—vertere modum formidine fustis.”—Hor. ad Aug. 152.

(*a*) Cod. 9, 36.

(*b*) The art of printing, soon after its introduction, was looked upon, as well in England as in other countries, as merely a matter of state, and subject to the coercion of the Crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and, finally, by the decrees of the Court of Star Chamber, which limited the number of printers, and of presses which each should em-

ploy, and prohibited new publications unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles the first, after their rupture with that prince, assumed the same powers as the Star Chamber exercised with respect to licensing of books; and in 1643, 1647, 1649 and 1652, issued their ordinances for that purpose, founded principally on the Star Chamber decree of 1637. (See Scobell, i. 44, 134; ii. 88, 230.) In 1662 was passed the statute 13 & 14 Car. 2, c. 33, which, with some few alterations, was copied from the parliamentary ordinances. This Act

[ment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish, as the law does at present, any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.]

expired in 1679, but was revived by statute 1 Jac. 2, c. 17, and continued till 1692. It was then continued for two years longer by statute 4 W. & M. c. 24; but though frequent attempts were made by government to revive it in the subsequent part of that reign (Com. Journ. 11 February, 1694, 26 No-

vember, 1695, 22 October, 1696, 9 February, 1697, 31 January, 1698), yet the parliament resisted it so strongly that it finally expired, and the press became properly free in 1694, and has ever since so continued. See also on this subject, sup. vol. III. p. 297.

CHAPTER XI.

OF OFFENCES AGAINST PUBLIC TRADE.



[OFFENCES against public *trade*, like those of the preceding classes, are either felonious or not felonious.] We shall notice—

I. That of smuggling, or the offence of importing or exporting goods prohibited, or without paying the duties imposed on goods not prohibited (*a*). This is restrained by the statutes relating to the customs. And, in particular, by the 16 & 17 Vict. c. 107 (called the Customs Consolidation Act, 1853,) it is, among other things, provided (by sect. 209), that if any goods liable to the payment of duties, shall be unshipped from any ship or boat in the united kingdom (customs or other duties not being first paid or secured): or if any prohibited goods be imported into any part of the united kingdom: or if any goods which have been warehoused in the united kingdom, shall be clandestinely or illegally removed: or if any goods prohibited to be exported shall be put on board for exportation, or with that object brought to any place in the united kingdom; or shall be found in any package produced to an officer of customs as containing goods not so prohibited: or if any goods subject to any duty or restriction in respect of importation, or prohibited to be imported, shall be found concealed on board ship within any port of the united kingdom,—then and in every of the

(*a*) According to Blackstone (vol. iv. p. 155), “smuggling” is the offence of importing goods with-

out paying the duties imposed by the laws of customs or excise; but this is too narrow a definition.

foregoing cases, all such goods shall be forfeited, together with any goods packed with or used in concealing them. By sect. 232 of the same Act, it is further enacted, that every person concerned in importing or bringing into the united kingdom any uncustomed or prohibited goods, or in concealing the same, or in any manner dealing with goods liable to duties of customs with intent to defraud her Majesty of the duties, shall, in each and every of the foregoing cases, forfeit either treble the value of the goods, or the penalty of 100*l.*, at the election of the commissioners of customs. By sect. 235, every person found on board a ship liable to forfeiture under any Act relating to the customs, under the circumstances mentioned in 16 & 17 Vict. c. 107, may, on conviction before a justice, be imprisoned, with hard labour, for the first offence for not less than six months, or more than twelve; for a second, not less than nine, or more than twelve months; and for any subsequent offence, for twelve months. By sect. 248, if any three or more persons, armed with offensive weapons, shall, within the united kingdom or the limits of any port, harbour or creek thereof, be assembled in order to be aiding, or shall aid, in the illegal landing, running or carrying away of prohibited goods, or goods liable to duties not paid or secured; or in rescuing such goods after seizure; or in rescuing any person apprehended for any offence made felony by any Act relating to the customs; or in preventing the apprehension of any person guilty of such felony,—every person so offending, and every person assisting or abetting therein, shall be guilty of *felony*: and he may be sentenced to penal servitude for life, or not less than fifteen years, or to be imprisoned for not exceeding three years(*b*). By sect. 249, any person who shall maliciously shoot at any vessel or boat belonging to the navy or in the service of the revenue, within one hundred leagues of the coast of the united kingdom;

(*b*) 16 & 17 Vict. c. 107, s. 248; 20 & 21 Vict. c. 3.

or shall maliciously shoot at, maim, or dangerously wound any full pay officer of the army, navy or marines, or any officer of customs or excise, or those aiding them, while duly employed for the prevention of smuggling and in the execution of his or their duty—shall be guilty of felony; and such offender, also, may be sentenced to the punishments last particularized. By sect. 250, if any person, (being in company with more than four other persons,) be found with any goods liable to forfeiture under any Act relative to the customs or excise; or (in company with one other person within five miles of the coast, or of any tidal river) be found carrying offensive arms or weapons, or disguised in any way,—he shall be adjudged guilty of felony; and he may be sentenced to penal servitude for not more than seven or less than three years (c). And, finally, persons assaulting or obstructing any such officers as above mentioned (or their assistants) in the performance of their duty, by force or violence, (though not made guilty of felony,) may be sentenced to the same term of penal servitude, or to imprisonment, with hard labour, for not more than three years (d).

II. Among the offences against public trade, must also be numbered certain *frauds committed by traders*, contrary to the provisions of the several Acts of parliament made in relation to the law of *Bankruptcy*. Of these, however, we have taken such note as seemed necessary in a former part of the work, when engaged on that branch of the law; and it will be unnecessary to recapitulate them in this place (e).

III. [*Cheating* is another offence, more immediately

(c) 16 & 17 Vict. c. 107, s. 250; 20 & 21 Vict. c. 3.

(d) 16 & 17 Vict. c. 107, s. 251; 20 & 21 Vict. c. 3. By 19 & 20 Vict. c. 75, s. 3, there is a penalty of 10*l.* attached to the offence of

wilfully destroying or injuring any buoy or mark used in the Preventive Service, or for the purposes of the Customs.

(e) Vide sup. vol. 11. p. 170 et seq.

[against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither, therefore, may be referred that prodigious multitude of statutes, which are made to restrain and punish deccits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves (*f*).] The offence of selling articles, knowing any trade marks thereon to be counterfeited, is [reducible to this head of cheating (*g*); as is likewise, in a peculiar manner, the offence of *selling by false weights and measures*, the standard of which fell under our consideration in a former volume (*h*).] The general punishment for all cheating which is indictable at common law (*i*), [is by fine and imprisonment (*h*);] to which, by 14 & 15 Vict. c. 100, s. 29, hard labour may now be added; though, if the cheating be in contravention of some particular enactment, [the easier and more usual way is by levying on a summary conviction, by distress and sale, the forfeitures imposed by the several Acts of parliament.]

(*f*) By 19 & 20 Vict. c. 114, provisions are made "to prevent false packing and other frauds in the *hay and straw trade*," which trade is regulated by 36 Geo. 3, c. 88. We may also notice here, that Blackstone (vol. iv. p. 157) mentions the offence of *breaking the assize of bread*,—that is, violating the rules laid down by several statutes for regulation of its price, viz., 51 Hen. 3, st. 1 and 6; ord. pistor. 2 & 3 Edw. 6, c. 15; 31 Geo. 2, c. 29. But all statutes relating to the assize are repealed by 6 & 7 Will. 4, c. 37, and (as to the city of London) by 3 Geo. 4, c. cvi.,—which contain new regulations as to the bread trade.

(*g*) Vide sup. p. 228. The penalty imposed for this species of

cheating, is the forfeiture of the value of the articles, and an additional sum to the extent of 5*l*. (25 & 26 Vict. c. 88, s. 4.) The adulteration of articles of *food and drink*, seems especially an offence against the *public health*, and is noticed accordingly, post, p. 349.

(*h*) Vide sup. vol. II. p. 539.

(*i*) As to what cheating in *matters of trade* is indictable or otherwise, at the common law, see *Rex v. Wheatley*, 2 Burr. 1128; *Rex v. Dixon*, 3 M. & S. 11; *Rex v. Haynes*, 4 M. & S. 214; 2 Russ. on Crimes, bk. iv. c. 31, s. 1.

(*h*) See *R. v. Treve*, 2 East, P. C. 821; *R. v. Dixon*, 3 Mau. & Sel. 11; *R. v. Haynes*, 4 Mau. & Sel. 214.

IV. A *monopoly* is [a licence or privilege allowed by the sovereign for the sole buying and selling, making, working, or using of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading, which he had before (*p*). These monopolies had been carried to an enormous height during the reign of Queen Elizabeth, and were heavily complained of by Sir E. Coke, in the beginning of the reign of James the first (*q*); but were in great measure remedied by statute 21 Jac. I. c. 3, which declares such monopolies to be contrary to law and void;—except as to patents to the authors of new inventions, and except also patents concerning printing, saltpetre, gunpowder, great ordnance and shot;—and monopolists are punished with the forfeiture of treble damages to those whom they attempt to disturb. And if they procure any action, brought against them for these damages, to be stayed by any extra-judicial order, other than that of the court wherein it is brought, they incur the penalties of a *præmunire* (*r*).]

(*p*) Vide sup. vol. II. pp. 25, 35. The old offences of *forestalling the market*, *regrating* and *engrossing*, are now repealed, (with many other statutes in restraint of trade,) by 7 & 8 Vict. c. 24. The offence of *forestalling* the market, consisted in buying the merchandize on its way to market, or dissuading persons to bring their goods there, or persuading them to enhance the price when there. That of *regrating*, consisted in buying corn, &c. in any market, and selling it again in or near the same place. That of *engrossing*, was getting into one's possession, or buying up large quantities of corn, &c., with intent to sell them again. We may also here allude to two other offences mentioned by Blackstone (vol. iv. pp.

154, 156). The first of these is that of *owling*, or the offence of transporting wool or sheep out of the kingdom; which, (with all other offences relating to the exportation of wool or sheep,) was repealed by 5 Geo. 4, c. 47. The other is that of *usury*; as to the history of which, vide sup. vol. II. p. 88 et seq.

(*q*) 3 Inst. 181.

(*r*) As to a *præmunire*, vide sup. p. 252 et seq. It was formerly an offence to *transport and seduce our artists to settle abroad*, or even to *export any tools or utensils used in certain manufactures*. And both of these are classed by Blackstone (vol. iv. p. 160), as offences against public trade. But as restrictions upon trade, such offences are now removed. For by 5 Geo. 4, c. 97, the

V. We may also here mention the provisions which have been made against assaulting or otherwise molesting persons engaged in the exercise of a lawful trade. For by 24 & 25 Vict. c. 100, s. 39, whosoever shall use, or threaten any violence to any person, to deter or hinder him from selling or disposing of any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place; or use or threaten violence to any person in charge or having care of its carriage, with intent to stop the same;—or (by sect. 40) who shall unlawfully and with force hinder any seaman, keelman, or caster from exercising his lawful trade or occupation; or shall beat or use violence to any such person with intent to prevent him from so working—may, on being summarily convicted before two justices, be imprisoned and kept to hard labour for three months(s). And by an earlier statute (6 Geo. IV. c. 129, s. 3,) to compel journeymen to leave their employment; or to return work unfinished; or to prevent them from hiring themselves; or to compel them to belong to clubs or pay fines; or to force manufacturers to alter their mode of carrying on their business(t)—is punishable in the same way.

pre-existing regulations of 5 Geo. 1, c. 27; 23 Geo. 2, c. 13; 25 Geo. 3, c. 67;—and by 6 Geo. 4, c. 105, those of 14 Geo. 3, c. 71,—were repealed. And by 6 & 7 Vict. c. 84, s. 24, is repealed such part of 3 & 4 Will. 4, c. 52, as prohibited the exportation of certain tools and uten-

sils from the United Kingdom.

(s) These provisions re-enact those contained in 9 Geo. 4, c. 31, ss. 25, 26, which were repealed by 24 & 25 Vict. c. 95.

(t) As to this provision, see *The Queen v. Rowlands*, 17 Q. B. 671.

CHAPTER XII.

OF OFFENCES AGAINST THE PUBLIC HEALTH, POLICE,
OR ECONOMY.

THE nature of the offences indicated by the title of this chapter, so far as they regard the public health, will be readily conceived: but it may be necessary to remark, that by offences against the public police and economy, we mean those committed against the due regulations and domestic order of the kingdom; [whereby the individuals of the State, like the members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious and inoffensive in their respective stations.] This head of offences (some of which are felonies, others indictable misdemeanors, and others again punishable only by pecuniary penalties) must therefore be very miscellaneous; [as it comprises all such crimes as especially affect public society, and are not comprehended under any of the preceding species (*a*).]

I. We shall mention first, under the present head, certain fraudulent practices contrary to the plain rules of honesty, but falling short of felony (*b*). One of these is the *selling of unwholesome provisions*. [To prevent which, the

(*a*) Vide sup. p. 218.

(*b*) Offences against the public health, police and economy are so numerous, that some selection will be indispensable. Those, therefore, are omitted from this chapter, which

have been sufficiently noticed in other parts of the work; such as those provided against in the marriage and registration Acts, the revenue Acts, the quarantine and vaccination Acts, &c.

[statute 51 Hen. III. st. 6, prohibits the sale of contagious or unwholesome *flesh*, or flesh that is bought of a Jew; under pain of amercement, fine and imprisonment, and abjuration of the town, according to the frequency of the offence(c). By the statute 12 Car. II. c. 25, s. 11, any adulteration of *wine* is punished with the forfeiture of 100*l.* if done by the wholesale merchant, and 40*l.* if done by the vintner or retail trader;] on which subject additional regulations are made by 1 Will. & M. st. 1, c. 34, s. 20. By 3 Geo. IV. c. cvi. and 6 & 7 Will. IV. c. 37, special provisions are made against the adulteration of *bread*, *corn*, *meal* or *flour*(d). By 11 & 12 Vict. c. 107, heavy penalties are imposed upon such as expose, or offer for sale, in any market or other public place, any *meat* unfit for human food. And a recent Act (23 & 24 Vict. c. 84), after referring to “the practice of adulterating articles of food and drink for sale in fraud of her Majesty’s subjects, and to the great hurt of their health,” provides generally that every person who shall sell any such article with which, to his knowledge, any ingredient or material injurious to the health of persons eating or drinking such article has been mixed, or who shall sell as pure and unadulterated any such article which is adulterated or not pure, may be fined 5*l.* and costs on a summary conviction before two justices;—and on a second offence, the justices may cause the offender’s name and address, and the offence he has committed, to be published in the newspapers, or such other way as to the justices may seem desirable (e).

(c) See as to this *Burnby v. Bollett*, 16 Mee. & W. 644.

(d) The first of these Acts relates to London; the other, to places elsewhere. We are told by Blackstone that the punishment of *bakers* for offences relating to bread was antiently to stand in the pillory; and for *brewers*, for offences relating to beer, to stand in the tumbrel, or dung cart,

“which, as we learn from Domesday Book, was the punishment for “knaveish brewers in the city of Chester, so early as the reign of Edward the Confessor: ‘*Malam cerevisiam faciens, in cathedrâ pone-batur stercoris.*’” (4 Bl. Com. p. 158.)

(e) This Act also provides for the appointment of *analysts*, by whom

Other species of [deceitful practice, in cozening another by artful means] have been noticed in former parts of this work—as, for example, that of obtaining property by personation, or by false pretences (*g*). But our limits will not allow us to pursue the subject in the present place, further than to add two instances. 1. By 32 Geo. III. c. 56, if any person shall personate a master and give a false character to a servant, or assert in writing that a servant has been hired for a period of time or in a station, or was discharged at any time, or had not been hired in any previous service, contrary to truth; or if any person shall offer himself as a servant, pretending to have served where he has not served, or with a false certificate of character, or shall alter a certificate, or shall pretend not to have been in any previous service, contrary to truth; the offenders, in any of the above cases, are liable, on conviction before two justices of peace, to be fined twenty pounds; and in default thereof to be imprisoned *with hard labour*, for any time not more than three nor less than one calendar month. And, 2, the false personation of voters at an election of a member of parliament, is made a misdemeanor by 6 & 7 Vict. c. 18, s. 83; and is punishable with imprisonment and hard labour for any term not exceeding two years.

II. [*Common nuisances*, are a species of offence against the public order and economical regimen of the State; being either the doing a thing to the annoyance of all the king's subjects, or the neglecting to do a good which the common good requires (*h*).] They are of the class of misdemeanors; and are distinguishable from *private* nuisances, as being a grievance to the community at large, and not merely to particular persons (*i*). Of the nature of common nuisances are—1. Annoyances in *highways* and *bridges*.

any article complained of may be tested.

(*g*) Vide sup. p. 229.

(*h*) Hawk. P. C. b. 1, c. 75, s. 1.

(*i*) As to private nuisances, vide sup. vol. III. p. 518.

Offences in respect of *highways* and *bridges* may be committed—as we have had occasion elsewhere to notice,—either positively, by actual obstructions, or negatively, by want of reparations. The latter, or negative, kind of offences, can of course only be committed by those upon whom an obligation lies to keep them in repair (*k*). But the positive offences against highways and bridges, consist of a variety of nuisances and other injuries (*l*) capable of being committed by any person indiscriminately; some of which are punishable at common law, and others by the express provisions of the highway, bridge and turnpike Acts (*m*). 2. The carrying on of *offensive* or *dangerous trades* or *manufactures* (*n*). These, which, [when injurious to a private man, are actionable (*o*), are, when detrimental to the public, punishable by fine and imprisonment;] and it may be remarked, that to support an indictment for these nuisances, it is not necessary to prove that they are offensive to health, if they are offensive to the senses (*p*). 3. *Exposing*, in a public thoroughfare, a *person infected* with a contagious disease, is a common nuisance, and punishable in a similar manner (*q*). 4. [All *disorderly inns*,^o or *other houses* (*r*); *bawdy*

(*k*) Vide sup. vol. III. p. 242 et seq.

(*l*) When there is a house erected, or an inclosure made, upon any part of the royal demesnes, or of a highway or common street or public water or such like public things,—the proper and antient name for such a nuisance is a *purpresture*; from the French word *pourpris*, an inclosure. (See 4 Bl. Com. p. 167, citing Co. Litt. 277.)

(*m*) As to nuisances to highways, see 5 & 6 Will. 4, c. 50; 4 & 5 Vict. cc. 51, 59; 8 & 9 Vict. c. 71; 11 & 12 Vict. c. 123; 25 & 26 Vict. c. 61. As to nuisances to turnpike roads, see 3 Geo. 4, c. 126; 4 Geo. 4, c. 95;

4 & 5 Vict. cc. 33, 51. As to nuisances to bridges, see 55 Geo. 3, c. 143. As to a *felonious* destruction or damage to bridges, turnpike gates, &c., vide sup. p. 223.

(*n*) See 1 & 2 Geo. 4, c. 41, as to the negligent use of furnaces or steam engines.

(*o*) Vide sup. vol. III. p. 518.

(*p*) Rex v. Neil, 2 C. & P. 485.

(*q*) See Rex v. Vantandillo, 4 M. & S. 73.

(*r*) We may remark here, that inns,—being intended for the lodging and receipt of travellers,—may be indicted, suppressed, and the innkeepers fined, if they refuse to entertain a traveller without a very sufficient cause;

[*houses (s)*; *gaming houses*; *play houses unlicensed or improperly conducted (t)*; *unlicensed booths and stages for rope dancers and mountebanks (u)*;] and the like,—are either at common law, or by statute, [public nuisances: and may, upon indictment, be suppressed and fined (*x*);] and their keepers in some cases imprisoned with hard labour (*y*). Against *gaming houses*, in particular, the efforts of the legislature have been directed with assiduous care (*z*). Thus the statute 33 Hen. VIII. c. 9, s. 11, prohibits the keeping any common house for dice, cards, or any “unlawful games,” under pecuniary penalties of 40*s.* for every day of so keeping the house, and 6*s.* 8*d.* for every time of playing therein (*a*). Also, by 9 Ann. c. 14, 2 Geo. II. c. 28,

for thus to frustrate the end of their institution is held to be disorderly behaviour. (See Hawk. P. C. b. 1, c. 78, s. 2; Bull. N. P. 73; Bennet v. Mellor, 5 T. R. 273; et sup. vol. 11. p. 84.) Thus, too, the laws of Norway, says Blackstone (vol. iv. p. 168,) punish in the severest degree such innkeepers as refuse to furnish accommodation at a just and reasonable price; and he cites Stiern. de Jure Sueon. l. 2, c. 9.

(*s*) See 25 Geo. 2, c. 36, s. 5.

(*t*) As to stage plays, vide sup. vol. III. p. 308.

(*u*) Bac. Ab. tit. Nuisances. But by 6 & 7 Vict. c. 68, s. 23, theatrical representations in booths, or shows at fairs or feasts, &c., are lawful, when allowed by the local authorities.

(*x*) By 22 & 23 Vict. c. 17, no indictment for keeping a disorderly house, shall be presented to or found by the grand jury, without security given for the due prosecution of the charge, unless the indictment be ordered by a judge, &c.

(*y*) See 3 Geo. 4, c. 114.

(*z*) Blackstone (vol. iv. p. 171) describes gaming as a passion to which every valuable consideration is made a sacrifice; and which we seem to have inherited from our ancestors the antient Germans: whom Tacitus (De Mor. Germ. c. 24) describes to have been bewitched with the spirit of play to a most exorbitant degree; and to have scrupulously maintained what they considered as the point of honour, in making good their losses: “*ea est in re pravâ pervicacia, ipsi fidem vocant.*”

(*a*) By 8 & 9 Vict. c. 109, s. 1, so much of 33 Hen. 8, c. 9, is repealed as prohibits *bowling, tennis*, or other games of mere skill. As to the game of *billiards*, it is lawful; but, when played in public, it is placed by the Act of 8 & 9 Vict. under certain restrictions—keepers of public billiard tables, bagatelle boards, and similar instruments, being required to be licensed by the justices at their general annual licensing meeting; and such keepers are forbidden, under heavy penalties, to

13 Geo. II. c. 19, and 18 Geo. II. c. 34,—the particular games of *faro*, *basset*, *ace of hearts*, *hazard*, *passage*, *roly poly* and *roulette*; and all other games with dice, except *backgammon*;—are prohibited under a penalty of 200*l.* for him that shall erect the same, and 50*l.* a time for the players (*d*). And now by 8 & 9 Vict. c. 109 (*e*), 16 & 17 Vict. c. 119, and 17 & 18 Vict. c. 38, further provisions are made for the punishment of those who keep or frequent *common gaming-houses* (*f*); and for the suppression of such houses, when discovered to exist (*g*). By these statutes it is provided (*h*), that the owner or keeper of any common gaming house, and every person having the care or management thereof,—and every banker, croupier, and other person in any manner conducting the business of any such house,—shall, on conviction by the oath of one witness, before two justices of the peace, be liable, in addition to the penalties of the 33 Hen. VIII. to pay

allow play between the hours of one and eight on any day, or at any hour on Sundays, Christmas Day, Good Friday, or day of public fast or thanksgiving. (8 & 9 Vict. c. 109, s. 10.)

(*d*) See also 30 Geo. 2, c. 24, s. 14, prohibiting, under a pecuniary penalty, gaming in public houses by labourers or servants. As to the offence of *gaming in a public place*, see also 5 Geo. 4, c. 83. In re Freestone, 1 H. & N. 93.

(*e*) This Act repeals a previous Act against fraudulent and excessive gaming, 16 Car. 2, c. 7; and also so much of 9 Ann. c. 14, and 18 Geo. 2, c. 34, as relates to the offence of losing or winning to a certain amount. See also the temporary Acts, 7 & 8 Vict. cc. 3, 58. As to the different games that have been decided to fall within the prohibition contained in one or

other of the Acts referred to in the text, see *Goodburn v. Morley*, 2 Stra. 1159; *Jeffreys v. Walter*, 1 Wils. 220; *Lynall v. Longbotham*, 2 Wils. 36; *Hodson v. Terhill*, 2 Tyrw. 929; *Bentinek v. Connop*, 5 Q. B. 693; *Daintree v. Hutchinson*, 10 Mees. & W. 85; *Applegarth v. Colley*, *ibid.* 723; *Foot v. Baker*, 5 Man. & G. 338.

(*f*) By 16 & 17 Vict. c. 119, *betting houses* are declared to be common gaming houses.

(*g*) By 8 & 9 Vict. c. 109, ss. 2, 5, 8, provisions are made as to what shall be deemed sufficient evidence of keeping a common gaming house, or of gaming.

(*h*) Besides the above statutes, provisions against gaming houses are also contained in the following Acts, 31 Eliz. c. 5; 25 Geo. 2, c. 36; 42 Geo. 3, c. 119; 2 & 3 Vict. c. 47.

such penalty (not being more than 500*l.*) as shall be adjudged by such justices: or, in the discretion of such justices, may be committed to the house of correction, with or without hard labour, for not more than twelve calendar months. And there is a proviso that such proceedings before the justices shall not prevent any proceeding by indictment against the owner, keeper, or manager of such house (*i*); but that, on the other hand, no person who has been so summarily convicted, shall be liable to be proceeded against, by indictment, for the same offence (*k*). It is also enacted, by these statutes, that every person who shall have been concerned in any unlawful gaming, but who on being examined as a witness before any justice of the peace, or on the trial of any indictment or information against the owner, or keeper, or person having the care of any common gaming house, touching such unlawful gaming,—shall make true discovery thereof to the best of his knowledge, shall be entitled to receive from the court, a certificate of his having done so; and shall be thereupon freed from all criminal prosecutions, forfeitures, and disabilities, for any thing done in respect of the unlawful gaming in which he was so concerned (*l*). But on the other hand, that any person found in any house, room or place legally entered by the police, under a warrant, as a suspected gaming place (*m*), may be *required* to be examined and to give evidence touching any unlawful gaming therein, or touching any obstructions to the entry; and shall not be excused from being examined or from answering any

(*i*) But by 22 & 23 Vict. c. 17, no indictment for keeping a gambling house shall be presented to, or found by the grand jury, without security given for the due prosecution of the charge, unless the indictment be by direction of a judge, &c.

(*k*) 8 & 9 Vict. c. 109, s. 4; and see 17 & 18 Vict. c. 38, s. 4.

(*l*) 8 & 9 Vict. c. 109, s. 9.

(*m*) Heavy pecuniary penalties are laid by 8 & 9 Vict. c. 109, and 17 & 18 Vict. c. 38, on such as unlawfully obstruct the authorized entrance of the police into suspected houses; or who, being found there, give false names or addresses.

question put to him touching such matters, on the ground that his evidence will tend to criminate himself (*n*). And further, that every person who shall by any fraud, unlawful device, or ill practice,—in play, betting, or wagering at any game,—win any sum of money or valuable thing, shall be deemed guilty of obtaining the same by a *false pretence*, and be punished accordingly (*o*); and that all contracts, (whether by parol or in writing,) by way of gaming or wagering, shall be null and void (*p*); and that no suit at law or in equity, shall be brought to recover from a stakeholder, a deposit on a wager (*q*). There is, however, a proviso, that this last enactment shall not be deemed to apply to any subscription towards a plate or prize at any lawful game, sport, pastime, or exercise (*r*).

5. [By statute 10 & 11 Will. III. c. 17, all *lotteries*, are declared to be public nuisances; and all grants, patents, or licences for the same, to be contrary to law (*s*);] and by

(*n*) 17 & 18 Vict. c. 38, s. 5. As to this being, in other cases, a ground for a witness refusing to answer particular questions, vide sup. vol. III. p. 636.

(*o*) 8 & 9 Vict. c. 109, s. 17. As to obtaining money by false pretences, vide sup. p. 229.

(*p*) 8 & 9 Vict. c. 109, s. 18; see Applegarth v. Colley, 10 Mee. & W. 723; Thorpe v. Coleman, 1 C. B. 990; Varney v. Hickman, 17 L. J. (C. B.) 102; Gatty v. Field, 9 Q. B. 431; Moon v. Durden, 2 Exch. 22. By 5 & 6 Will. 4, c. 41, (amending 9 Ann. c. 14,) all notes, bills, or mortgages, given for money won at play shall be deemed to be given on an illegal consideration; and are consequently void between the original parties; but they are not void in the hands of indorsees or purchasers for valuable consideration without notice. As to the above provision, see Hay v. Ayling, 20 L. J. (Q. B.)

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(*q*) As to this provision, see Varney v. Hickman, 5 C. B. 271.

(*r*) As to *horse racing* for a plate or prize, it may be observed, that it does not itself fall under any prohibitory enactment. For though, by 13 Geo. 2, c. 19. no plates or matches at horse races under 50*l*. value, could be run under penalty of 200*l*., this enactment was repealed by 3 & 4 Vict. c. 5. But as to bets or wagers on horse racing, see Evans v. Pratt, 2 M. & G. 769; Thorpe v. Coleman, 1 Q. B. 990; Pugh v. Jenkins, 1 Q. B. 631; Bentinck v. Connop, 5 Q. B. 693; Applegarth v. Colley, 10 Mee. & W. 723. As to a *courseing match*, see Daintree v. Hutchinson, 10 Mee. & W. 85. As to a *foot-race*, see Batty v. Marshall, 5 C. B. 817.

(*s*) As to *lotteries*, see also 9 Ann. c. 6, s. 56; 10 Ann. c. 26, s. 109; 8 Geo. 1, c. 2, ss. 36, 37; 9 Geo. 1,

12 Geo. II. c. 28, 13 Geo. II. c. 19, and 18 Geo. II. c. 34, all private lotteries by tickets, cards, or dice, are specifically prohibited. State lotteries, however, were, for the purposes of revenue, continued to be authorized from time to time by successive Acts of parliament, until the 6 Geo. IV. c. 60, which utterly abolished them. 6. To this head we may also refer the offences of [*making, keeping or carrying* too large a quantity of *gunpowder* (*t*) at one time, or in one place or vehicle (*u*);] and of *using mills or engines* for making gunpowder, except in places duly licensed (*x*);—and such practices are prohibited by the 23 & 24 Vict. c. 139 (*y*),—amended by 24 & 25 Vict. c. 130, and 25 & 26 Vict. c. 98,—under heavy penalties and forfeitures (*z*). And the Acts last mentioned also require the manufacture of all *fireworks*, and of other preparations or compositions of an explosive nature, to be also carried on in licensed places; and moreover prohibit

c. 19, ss. 4, 5; 6 Geo. 2, c. 35, ss. 29, 30; 22 Geo. 3, c. 47; 27 Geo. 3, c. 1; 46 Geo. 3, c. 148, s. 59. As to the lotteries known by the name of *little goes*, see 42 Geo. 3, c. 119, and *Allport v. Nutt*, 3 D. & L. 233. As to *foreign lotteries*, see 6 & 7 Will. 4, c. 66, and 8 & 9 Vict. c. 74. See also 9 & 10 Vict. c. 48, legalizing *Art Unions*, and 21 & 22 Vict. c. 102, for indemnifying a certain association for disposal of works of art as prizes.

(*t*) To keep or make any gunpowder, or other explosive substance or dangerous thing, *with intent by means thereof to commit any of the felonies mentioned in the 24 & 25 Vict. c. 100*, is by the 64th section of that Act, made a misdemeanor punishable with two years' imprisonment; and the offender, on conviction, may be also fined and bound over to keep the peace and be of good behaviour (sect. 71.)

(*u*) See *R. v. Taylor*, 2 Stra. 1167; *R. v. Matters*, 1 B. & Ald. 362.

(*x*) By 25 & 26 Vict. c. 66, regulations of a similar description, are made with respect to the carriage or keep of a highly inflammable substance called *petroleum*.

(*y*) This Act repeals 9 & 10 Will. 3, c. 7, 12 Geo. 3, c. 61, and other enactments previously in force on this subject.

(*z*) See also 54 Geo. 3, c. 159, s. 6; 14 & 15 Vict. c. 67. As to the seizure of gunpowder, see 3 & 4 Will. 4, c. 19, s. 36; 2 & 3 Vict. c. 47, s. 35; 9 & 10 Vict. c. 25. As to the manufacture of fire-arms, 53 Geo. 3, c. 115. As to public nuisances arising from the keeping or using of dangerous materials generally, or from practising dangerous games, see *Williams v. East India Company*, 3 East, 200, 201; *R. v. Moore*, 3 B. & Ad. 184.

under a penalty, the sale of any fireworks by unlicensed persons, or to any person apparently under the age of sixteen. The Acts also declare that if any person shall throw or fire any squib or other firework in any thoroughfare or public place, he shall be liable to a penalty of 5*l.* (a). 7. *Eaves-dropping*,—or the offence committed by such [as loiter under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales,—is a common nuisance;] and the offenders are indictable at sessions, and are liable to be fined and bound over to their good behaviour. 8. Lastly, we must enumerate among nuisances noticed in our law, (though in practice it has long ceased to be the subject of prosecution,) that of being a *common scold*. [For which offence the *communis rixatrix*, (for our law confines it to the feminine gender,) may be indicted (b); and, if convicted, she shall be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or *cucking* stool; which, in the Saxon language, is said to signify the scolding stool; though now it is frequently corrupted into *ducking* stool; because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment (c).]

Such is the general state of the law, with respect to common nuisances; but it is material to add here that, as to all those species of them which tend to affect the *public health*, they are now very specially provided against by the several Acts for improving the sanatory condition of the people,—particularly by the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the Local Government Acts, 1858 and 1861 (21 & 22 Vict. c. 98, and 24 & 25 Vict. c. 61); the Diseases Prevention Act, 1855 (18 & 19 Vict.

(a) See 2 & 3 Vict. c. 47, s. 4, and *The Queen v. Bennett*, 28 L. J. (M. C.) 27, as to this offence within the *metropolitan* district.

(b) *R. v. Foxby*, 6 Mod. 213.

(c) *Hawk. P. C. b. 1, c. 75, s. 5*; 3 Inst. 219.

c. 116); and The Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121). By the provisions of these Acts respectively, and of those passed for their amendment, a great variety of such nuisances are particularly described and prohibited: under the penalties of misdemeanor in some instances, and in others under pecuniary penalties recoverable before the justices of the peace. Any account of them, however, would be unsuitable to this place; and the rather, because the subject has been in part anticipated in a former volume (*d*).

III. We shall next notice that offence with regard to the holy estate of matrimony(*e*), which is called *bigamy* (*f*), and which consists of a second marriage (*g*), by one having a former husband or wife still living (*h*). Such second

(*d*) Vide sup. vol. III. pp. 283, 284.

(*e*) Other offences relating to the manner of celebrating marriage are noticed, sup. vol. II. pp. 264, 272.

(*f*) Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other; or in once marrying a widow. Such were esteemed incapable of orders, &c.; and by a canon of the council of Lyons, A.D. 1274, held under Pope Gregory the tenth, were "*omni privilegio clericali nudati, et coercioni fori secularis addicti.*"—(6 Decretal. I. 12.) This canon was adopted and explained in England by 4 Edw. 1, st. 3, s. 5; and *bigamy* thereupon became no uncommon counterplea to the claim of benefit of clergy. (M. 40 Ed. 3, 42; M. 11 Hen. 4, 11, 48; M. 13 Hen. 4, 6; Staundf. P. C. 134.) The cognizance of the plea of *bigamy* was declared by stat. 18 Edw. 3, st. 3, c. 2, to belong to the court christian, like that of *bastardy*.

But by stat. 1 Edw. 6, c. 12, s. 16, *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dal. 21; Dy. 201. As to benefit of clergy, vide post, c. XXIII.

(*g*) Blackstone says (vol. iv. p. 163), that the offence of bigamy "is more justly denominated *polygamy*, or having a plurality of "wives at once:" and he objects to the term bigamy as corruptly applied to the case; because it "properly signifies being twice married." The correctness of this criticism, however, seems questionable. For whatever the number of marriages that may have taken place, the substance of the charge always is, that, having a lawful wife, (or husband,) still living, the offender marries a *second* time;—any intervening marriage being wholly immaterial and out of the case as far as the prosecution is concerned.

(*h*) 3 Inst. 88. It may be here observed, that, for the purposes of

marriage [is simply void, and a mere nullity, by the ecclesiastical law of England: and yet the legislature has thought it just to make it felony; by reason of its being so great a violation of the public economy and decency of a well-ordered State. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations; the fallaciousness of which has been fully proved by many sensible writers: but in northern countries, the very nature of the climate seems to reclaim against it;—it never having obtained in this part of the world, even from the time of our German ancestors, who, as Tacitus informs us (i), “*prope soli barbarorum, singulis uxoribus contenti sunt*”(j).] And with us in England, it is enacted by 24 & 25 Vict. c. 100 (k), that whosoever, being married, shall marry any other person during the life of the former husband or wife, (whether the second marriage shall have taken place in England, Ireland or elsewhere,) shall be

the 20 & 21 Vict. c. 85, “to amend “the law relating to divorce and “matrimonial causes in England,” the term “bigamy” is to be taken to mean the “marriage of any person “being married, to any other person during the life of the former “husband or wife, whether the “second marriage shall have taken “place within the dominions of her “Majesty, or elsewhere.”

(i) De Mor. Germ. 18.

(j) Blackstone adds (vol. iv. p. 164), that bigamy is punished with death by the laws both of antient and modern Sweden; and he cites Stiernh. de Jure Sueon. l. 3, c. 2.

(k) This statute describes itself as one relating to offences against the person; and—as among the offences to which it relates is that of bigamy,—it may be said to treat of bigamy, as if it were an offence against the

person. But it is classed by Blackstone (and this classification has been followed in the present work) as an offence against the public police or economy—a view of it obviously more scientific. For in bigamy, the man and woman may both be aware of the first marriage; and in this case it would be difficult to say in what sense the words “the person” are to be understood, if the second marriage is to be described as an offence against the person. To understand them of the person of the first husband or wife, would seem hardly satisfactory. Under these circumstances, we have not altered the classification of Blackstone. Indeed, it can scarcely have been the intention of the legislature to establish a different one, so far as the purposes of the student are concerned.

guilty of felony; and is liable to penal servitude for not more than seven or less than three years, or to be imprisoned, with or without hard labour, for not more than two years (*l*). It is to be observed, however, [that the first wife, in this case, shall not be admitted as a witness against her husband (*m*), because she is the true wife; though the second may, because she is indeed no wife at all (*n*); and so *vice versâ* of a second husband:] and it is held necessary to prove that the first marriage was duly solemnized; mere proof of cohabitation not being sufficient (*o*). Moreover, the above enactment does not extend to the following cases (*p*). 1. That of a second marriage contracted out of England or Ireland, by any other than a subject of Her Majesty (*q*). 2. That of any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past; and shall not have been known by such person to be living within that time (*r*). 3. That of a person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage. 4. That of a person whose former marriage shall have been declared void, by the sentence of any court of competent jurisdiction (*s*). In reference, however, to the second of these cases, it is to be observed that the second marriage is, under the circumstances referred to, a *nullity*, although it be attended with no penal consequences.

(*l*) 24 & 25 Vict. c. 100, s. 57. The offender may also, if the court see fit, be bound over with sureties to keep the peace (sect. 71).

(*m*) Vide *sup.* vol. II. pp. 275, 276; vol. III. p. 635.

(*n*) 1 Hale, P. C. 693; 1 East, P. C. c. 12, s. 9; Peat's case, 2 Lewin, 288.

(*o*) See *R. v. James*, R. R. C. C. 17; *R. v. Morton*, *ibid.* 19; *R. v.*

Butler, *ibid.* 61; *R. v. Bowen*, 2 C. & K. 227.

(*p*) 24 & 25 Vict. c. 100, s. 57.

(*q*) As to this exception see *Toppling's case*, 1 Dearsley's C. C. R. 647.

(*r*) See *The Queen v. Briggs*, 26 L. J. M. C. 7.

(*s*) *Duchess of Kingston's case*, 11 St. Tr. 262; 1 Leach, 146; *Hawk. P. C. b. 1, c. 42, s. 11.*

IV. *Lewdness* is also an offence against the public economy, when of an open and notorious character; as by [frequenting houses of ill-fame, which is an indictable offence: or by some grossly scandalous and public indecency; for which the punishment] at common law [is fine and imprisonment. In the year 1650,] when the republican party had the ascendant, [the repeated act of keeping a brothel, or committing fornication, was, upon a second conviction, made felony without benefit of clergy (*t*). But at the Restoration, when men,] from an abhorrence of what they deemed the hypocrisy of the late times, [fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour.] And the offence of lewdness was then abandoned [to the feeble coercion of the spiritual court, according to the rules of the canon law (*u*): a law which has treated the offence of incontinence with a great deal of tenderness and lenity; owing perhaps to the constrained celibacy of its first compilers (*x*).] To this head may be also properly referred, the offences of a public and indecent exposure of the person: and the public selling, or exposure for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition:—the punishment of which is fine or imprisonment, or both, with hard labour at the discretion of the court (*y*). Moreover, by 20 & 21 Vict. c. 83, any two justices (*z*), upon complaint made, on oath, of the complainant's belief, that any obscene books, papers, writings, prints, pictures, draw-

(*t*) Scob. 121. As to *adultery*, vide sup. vol. III. pp. 553, 554. It is remarked by Blackstone (vol. iv. p. 65), that at the period alluded to in the text, "incest and wilful adultery" were made capital crimes." This offence, and that of *drunkenness*, are treated of by him as offences against God and religion.

(*u*) Vide sup. p. 175, however, as to the offence of fraudulently pro-

curing the defilement of young females.

(*x*) Proceedings in the ecclesiastical courts for incontinency have, in modern times, however, been out of use. (Vide sup. vol. III. p. 445, n.)

(*y*) 14 & 15 Vict. c. 100, s. 29.

(*z*) The same powers are given by the Act (sect. 1) to any single metropolitan or stipendiary magistrate.

ings, or other representations, are kept in any place for the purpose of being sold, distributed, exhibited, lent on hire, or otherwise published, for *gain*;—and that one or more articles of the like character have been published at or in connection with such place, so as to satisfy the justices that such belief of the complainant is well founded, —may (on being satisfied that any of such articles so kept are of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such,) issue a special warrant authorizing an entry in the day time by the police, by force if necessary; and the seizure and destruction, (if the owner does not, to their satisfaction, show cause to the contrary,) of the articles in question. An appeal, however, is given by this Act to any person aggrieved, to the next general or quarter sessions of the peace (*a*).

V. *Drunkenness* also may be referred to this head; [and is punished by statute 4 Jac. I. c. 5,] and 21 Jac. I. c. 7, sects. 1, 3, [with the forfeiture of five shillings,] to be paid, within one week after conviction, to the churchwardens, for the use of the poor: and upon a second conviction, the offender shall be bound with two sureties in 10*l.* for his good behaviour (*b*).

.VI. A seventh offence, which seems properly to rank

(*a*) 20 & 21 Vict. c. 82, s. 4.

(*b*) Under the head of public economy (says Blackstone, vol. iv. p. 170), may also properly be ranked all sumptuary laws against *luxury*, and extravagant expenses in dress, diet, and the like. Concerning excess in apparel, there were formerly a multitude of penal laws existing,—chiefly made in the reigns of Edward the third, Edward the fourth, and Henry the eighth,—against piked shoes, short doublets, and long

coats; all of which were repealed by stat. 1 Jac. 1, c. 25. But as to excess in diet, Blackstone goes on to remark, there still remained one ancient statute unrepealed, (10 Edw. 3, st. 3,) which ordains that no man shall be served at dinner or supper with more than two courses; except upon some great holidays there specified, in which he may be served with three. This statute also was at length expressly repealed, by 19 & 20 Vict. c. 64.

under this head, is that of *wanton and furious driving*; as to which, it is declared by 24 & 25 Vict. c. 100, that if any person having the charge of any carriage or vehicle shall, by wanton or furious driving, or racing, or other wilful misconduct or neglect do, or cause to be done, any bodily harm to any person whatsoever, he shall be guilty of a misdemeanor and be imprisoned with or without hard labour to the extent of two years (c). The enactment that such conduct shall amount to a misdemeanor, must be taken as declaratory only of the common law; according to which it is a misdemeanor,—and may even amount to manslaughter or murder,—for any person to drive or ride so wantonly and furiously, as to endanger the passengers on the highway (d).

VII. An eighth offence is that of *cruelty to animals*; it being enacted by 12 & 13 Vict. c. 92 (amended by 17 & 18 Vict. c. 60,) that if any person shall cruelly beat, ill-treat, over-drive, abuse, or torture any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog (e), cat, or any other domestic animal,—he shall forfeit a sum not exceeding 5*l.* for every such offence, recoverable before a justice of the peace in a summary way; and if by any such misconduct he shall injure the animal, or any person or property, a further sum not exceeding 10*l.* to the owner, or person injured (f).

(c) 24 & 25 Vict. c. 100, s. 35. The offender may also, in addition to or in lieu of any other punishment, be bound over by the court to keep the peace or be of good behaviour (sect. 71). The previous enactment as to this offence contained in 1 Geo. 4, c. 4, is repealed by 24 & 25 Vict. c. 95.

(d) Fost. 263; see *R. v. Mastin*, 6 C. & P. 396; *R. v. Taylor*, 9 C. & P. 672. By the Acts relative to stage coaches, pecuniary penalties are also

imposed on the drivers thereof, in the case of furious driving. (Vide sup. vol. III. p. 288.)

(e) By 2 & 3 Vict. c. 47, (extended by 17 & 18 Vict. c. 60, s. 2,) it is prohibited, under a penalty, to use any dog for the purposes of *draught*.

(f) Previous Acts on the same subject, 3 Geo. 4, c. 71, and 3 Will. 4, c. 19, were repealed by 5 & 6 Will. 4, c. 59; and the Act last mentioned, by 12 & 13 Vict. c. 92.

The Acts also inflict penalties in the case of conveying any such animal in such a manner or position, as to subject it to unnecessary pain or suffering; and also in the case of bull baiting, cock fighting, and the like (*g*). And they make a variety of humane provisions for the regulation of the business of slaughtering horses, and other cattle not intended for butcher's meat (*h*). They contain also provisions for ensuring a proper supply of food and water, to animals *impounded* (*i*).

VIII. Another misdemeanor against the public economy is that of *concealing a birth*. For by 24 & 25 Vict. c. 100 (*j*), it is enacted, that if any woman be delivered of a child, every person who shall by any secret disposition of the dead body of the said child, (whether such child died before or after its birth,) endeavour to conceal the birth thereof; shall be guilty of a misdemeanor; and be liable to be imprisoned, with or without hard labour, for any term not more than two years (*k*). It is also provided, that if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the same jury, to find such person guilty (if the case be so) of endeavouring to conceal the birth: upon which the court may

(*g*) See Clarke, app. v. Hague, resp. 29 L. J. (M. C.) 105.

(*h*) See also the previous Act of 7 & 8 Vict. c. 87; and as to slaughterhouses, &c., 26 Geo. 3, c. 71.

(*i*) Vide sup. vol. III. p. 365.

(*j*) This statute describes itself as one relating to offences against *the person*. But the secret disposition of the dead body of a child alone, unconnected with any violence done to it while living, does not seem to be naturally and satisfactorily described as an offence against its person. Indeed, the legislature can hardly be considered as intending to establish by its authority the proper

arrangement for this crime in a scientific point of view. On the whole, therefore, we retain the arrangement for it which we have hitherto employed, viz., that of an offence against the public police or economy. The provision on the subject contained in 9 Geo. 4, c. 31, s. 14, is repealed by 24 & 25 Vict. c. 95.

(*k*) 24 & 25 Vict. c. 100, s. 60. The offender, if the court think fit, may also, in addition to or in lieu of any other punishment, be bound over to keep the peace and be of good behaviour (sect. 71).

pass the same sentence, as if such person had been convicted upon an indictment for the concealment (*l*).

IX. *Taking up dead bodies*, for the purpose of dissection or otherwise, is also a misdemeanor at common law, and punishable with fine and imprisonment (*m*). And under this head may also be noticed the offence, of *refusing to bury dead bodies* by those whose duty it is so to do; which appears to be punishable by the temporal courts, (independently of spiritual censures,) on indictment or information (*n*).

X. *Refusing to serve a public office* (such as that of constable or overseer), without lawful excuse or exemption,

(*l*) 24 & 25 Vict. c. 100, s. 60. The law on this subject was formerly different. For by 21 Jac. 1, c. 27, it was enacted, that if any woman was delivered of a child, which, if born alive, would have been by law a bastard, and endeavoured privately to conceal its birth, by burying the child or the like, the mother so offending should suffer death, as in the case of murder; unless she could prove, by one witness at least, that the child was actually born dead. A law as to which Blackstone remarks (vol. iv. p. 198), that, "though it savours pretty strongly of severity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, it is nevertheless also to be met with in the criminal codes of many other nations of Europe,—as the Danes, the Swedes and the French;" and he goes on to remark, that "it had of late years been usual with us in England, upon trials for this offence, to require some sort of presumptive evidence that the child was born alive; before the other

"constrained presumption,—that the child whose death is concealed was therefore killed by its parent, —was admitted to convict the prisoner." This statute was afterwards repealed by 43 Geo. 3, c. 58, which provided that the trials of women charged with the murder of any of their issue, which would by law be bastard, should proceed by the like rules of evidence and presumption as were allowed in other trials for murder.

(*m*) See Arch. Cr. Pr. 675; *R. v. Lynn*, 2 T. R. 733; 2 East's P. C. c. 16, s. 89; *R. v. Duffin*, R. & R. C. C. R. 365; *The Queen v. Sharpe*, 26 L. J., M. C. 47. As to obtaining bodies for dissection under the Anatomy Act (2 & 3 Will. 4, c. 75), vide sup. vol. III. p. 322.

(*n*) *Andrews v. Cawthorne*, Willes, 527, n. a; and see *Mastin v. Escott*, decided May 8, 1841, by Sir H. Jenner Fust; and *Kemp v. Wickes*, 2 Phil. Rep. 264. As to the interment of dead bodies cast on shore from the sea, see 48 Geo. 3, c. 75.

is also a misdemeanor at common law, punishable with fine and imprisonment (*o*).

XI. Another offence, ranging itself under our present head, is that of [destroying such beasts and fowl as are ranked under the denomination of *game*;] concerning which, (considered as a species of *property*,) we had occasion in a former volume to enter into some discussion (*p*).

It will be necessary here, however, to add to what is there contained, some notice of the penal enactments relative to its destruction in the *night time*; when (from obvious considerations) it is treated as an offence of considerable gravity. By 9 Geo. IV. c. 69, s. 1 (*q*), it is provided, that if any person shall, by night (*r*), unlawfully take or destroy any game or rabbits, in any land (whether open or enclosed); or on any public road, highway, or path, or the sides thereof; ~~or~~ at the openings, outlets or gates from any such lands into such roads;—or shall, by night, be in such places, with any gun, net, engine or other instrument, for the purpose of taking or destroying game;—he shall be liable to imprisonment, for the first offence, for any period not exceeding three months, with hard labour; and, at the expiration of such period, to be bound over to his good behaviour by sureties for a year: or, in default of such recognizance, to be further imprisoned for six months, or until such sureties are found (*s*). For a second offence, such person shall be liable to imprisonment for six months, and then to be bound in sureties for two years; and in default thereof, to be further imprisoned

(*o*) Arch. Cr. Pr. 679. See *R. v. Poynder*, 1 B. & C. 178; *R. v. Bower*, ib. 587.

(*p*) Vide sup. vol. II. pp. 5, 20.

(*q*) This statute was amended by 7 & 8 Vict. c. 29.

(*r*) By 9 Geo. 4, c. 69, s. 12, the *night*, ~~for~~ the purpose of this provision, shall be considered to com-

mence at the expiration of one hour after sunset, and to conclude at the beginning of the last hour before sunrise. There is also a provision in 24 & 25 Vict. c. 96, s. 17, with respect to the unlawful taking or killing hares or rabbits in warrens, *by night*.

(*s*) 9 Geo. 4, c. 69, s. 1.

for one year, or until such sureties are found (*t*). And if he shall offend a third time, he is guilty of a misdemeanor; and he is then liable to penal servitude for not more than seven or less than three years, or to be imprisoned, with hard labour, for any time not exceeding two years (*u*). It is moreover provided, that when any person shall be found committing such offence, it shall be lawful for the owner or occupier of the land; or for any person having a right of free warren or free chase therein; or for the lord of the manor; or for the gamekeeper or servant of such persons or their assistants;—to seize and apprehend any person so offending: and in case he shall assault or offer any violence with any offensive weapon, towards any person so authorized to apprehend him, he is guilty of a misdemeanor; and he is, in that case, liable to penal servitude for not more than seven or less than three years, or to be imprisoned, with hard labour, for any term not exceeding two years (*x*).

It is further enacted by sect. 9 of the same Act, that if any persons, to the *number of three or more*, shall, by night, unlawfully enter such lands or roads, for the purpose of taking or destroying game or rabbits (any of them being armed with any gun or other offensive weapon), each of such persons shall be guilty of a misdemeanor: and be liable to penal servitude for any term not more than fourteen years, or less than three years; or to be imprisoned, with hard labour, for not more than two years (*y*).

XII. Lastly, under the general head of *vagrancy and*

(*z*) 9 Geo. 4, c. 69, s. 1.

(*u*) Ibid.; 7 & 8 Vict. c. 29; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*x*) 9 Geo. 4; c. 69, s. 1; 7 & 8 Vict. c. 29; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*y*) 9 Geo. 4, c. 69, s. 9; 9 & 10 Vict. c. 24; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. See the following cases as to the construction of

9 Geo. 4, c. 69, s. 9: *R. v. Dowsell*, 6 Car. & P. 398; *R. v. Gainer*, 7 Car. & P. 231; *R. v. Kendrick*, *ibid.* 184; *R. v. Davis*, 8 Car. & P. 759; *R. v. Fry*, 2 M. & Rob. 42; *Fletcher v. Calthrop*, 6 Q. B. 880; *R. v. Jones*, 2 Cox's Cr. C. 185; *R. v. Merry*, *ibid.* 240; *R. v. Whitaker and others*, 17 L. J., M. C. 127; *R. v. Uezzell and others*, 20 L. J., M. C. 192.

other disorderly conduct, may be classed a variety of offences against the public economy (*a*). [The civil law expelled all sturdy vagrants from the city (*b*). And, in our own law, idle persons and vagabonds,—whom our antient statutes describe to be, “such as wake on the night and sleep on “ the day, and haunt customable taverns and alehouses, “ and routs about; and no man wot from whence they “ come, ne whither they go;”] and who are more particularly described by statute 5 Geo. IV. c. 83 (*c*), and there divided into three classes, *idle* and *disorderly* persons, *rogues* and *vagabonds*, and *incorrigible rogues*;—are all [offenders against the “good order, and blemishes in the government, of any kingdom.] They are therefore all punished by the above statute (*d*): that is to say, *idle* and *disorderly* persons, with one month’s imprisonment, and hard labour: and *rogues* and *vagabonds* with three months’ imprisonment, and hard labour: while *incorrigible rogues* (*e*), may be committed to the next sessions

(*a*) Vide sup. vol. III. p. 224, as to the disposal of children under the age of fourteen found vagrant, &c.

(*b*) Nov. 80, c. 5.

(*c*) This Act is amended by 1 & 2 Vict. c. 38.

(*d*) By other Acts, also, persons committing particular offences of various kinds are to be deemed *idle* and *disorderly persons*, &c. within the statute referred to in the text, and punished accordingly.

(*e*) In 5 Geo. 4, c. 83, ss. 3, 4, 5, the species of offenders comprised in the three general appellations of *idle* and *disorderly persons*, *rogues* and *vagabonds*, and *incorrigible rogues*, are particularly defined. But the enumeration is too long for insertion. We may remark that under it, two classes of offenders seem to be now punishable, who were formerly treated by our law with much more

severity. 1. *Idle soldiers and marines*, or persons pretending to be *soldiers* or *marines*, wandering about the realm. Such persons were deemed under the statute 39 Eliz. c. 17, (repealed by 52 Geo. 3, c. 31,) to be *ipso facto* guilty of a capital felony. 2. *Outlandish persons calling themselves Egyptians or Gypsies*. Against these, provisions were made by 1 & 2 Ph. & M. c. 4, and 5 Eliz. c. 20; by which if the gypsies themselves, or if any person, being fourteen years old, who had been seen or found in their fellowship, or had disguised himself like them, remained in this kingdom one month, it was felony; and we are informed by Sir M. Hale (1 Hale, P. C. 671), that at one Suffolk assizes, no less than thirteen gypsies were executed upon these statutes. But they are now repealed by 23 Geo. 3, c. 51, and 1 Geo. 4,

of the peace, and kept to hard labour in the interim: and may be further punished, if convicted at the sessions, with imprisonment and hard labour for one year, and with whipping, except in the case of females (e).

c. 116. (See also 19 & 20 Vict. c. 64.) Blackstone remarks (vol. iv. p. 165), as to gypsies, that “they are a strange kind of common-wealth among themselves of wandering impostors and jugglers, who were first taken notice of in Germany about the beginning of the fifteenth century, and have since spread themselves all over Europe. Munster, who is followed and relied upon by Spelman and other writers, fixes the time of their first appearance to the year 1417; under passports, real or pretended, from the Emperor Sigismund, king of Hungary. And Pope Pius the second, (who died A.D. 1464,) mentions them in his history as thieves and vagabonds, then wandering with their families over Europe under the name of Zigari; and whom he supposes to have migrated from the country of the Zigi, which nearly answers to the modern Circassia. In the compass of a few years they gained such a number of idle proselytes (who imitated their language and complexion, and betook themselves to the same arts of chicanery, begging and pilfering), that they became troublesome, and

“even formidable, to most of the states of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591. And the government in England took the alarm much earlier; for in 1530 they are described by statute 22 Hen. 8, c. 10, as outlandish people calling themselves Egyptians, using no craft nor feat of merchandize, who have come into this realm, and gone from shire to shire, and place to place, in great company, and used great subtle and crafty means to deceive the people; bearing them in hand, that they by palmestry could tell men and women’s fortunes; and so, many times, by craft and subtilty have deceived the people of their money; and also have committed many heinous felonies and robberies.” Much more recent information, however, as to the origin and history of the Gypsies, will be found in the work of Mr. Borrow, called “Zincali,” published in 1841.

(e) By 5 Geo. 4, c. 83, s. 13, houses of reception for travellers, may be searched for vagrants, &c. and the suspected parties may be carried before a magistrate.

CHAPTER XIII.

OF THE MEANS OF PREVENTING OFFENCES.

[WE are now arrived at the fifth general branch or head, under which we were to consider the subject of this Book of our Commentaries (*a*) ; viz., the means of *preventing* the commission of crimes and misdemeanors : and really it is an honour, and almost a singular one, to our English laws, that they furnish a title of this sort ; since *preventive* justice is, upon every principle of reason, of humanity and of sound policy, preferable, in all respects, to *punishing* justice (*b*) ; the execution of which, though necessary, and in its consequence a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

This preventive justice consists of obliging those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen : by finding plèdges, or securities, for keeping the peace ; or for their good behaviour.]

[By the Saxon constitutions these sureties were always at hand, by means of King Alfred's wise institution of decennaries or frank pledges ; wherein, as has more than once been observed, the whole neighbourhood, or tything, of freemen were mutually pledges for each other's good behaviour (*c*). But this great and general security being now fallen into disuse and neglected, there hath succeeded to it the method of making suspected persons find particular

(*a*) Vide sup. p. 36.

(*c*) Vide sup. vol. i. p. 127.

(*b*) Beccar. ch. 41.

[and special securities for their future conduct; of which we find mention in the laws of King Edward the Confessor; “*tradel fidejussores de pace et legalitate tuendâ (d)*.”]

This security is either for *keeping the peace*, or for *good behaviour*; and [consists in being bound with one or more securities in a recognizance or obligation] to the Crown, [and taken in some court, or by some judicial officer (*e*); whereby the party acknowledges himself to be indebted to the Crown in the sum required, (for instance 100*l.*) with condition to be void and of none effect if he shall appear in court on such a day, and in the mean time shall keep the peace either generally, towards the sovereign and all his liege people; or particularly also, with regard to the person who craves the security.] Or, on condition so to keep the peace for a certain period, not dependant on any appearance in court (*g*). [Or, if it be

(*d*) Cap. 18. It is said in *Willis v. Bridges*, 2 B. & Ald. 287, that the authority of a justice of the peace, to take security for the peace, appears to have had its origin in stat. 1 Edw. 3, st. 2, c. 16; and that this authority is more fully set forth in 3*l* Edw. 3, s. 1.

(*e*) As to *recognizances* generally, vide sup. vol. II. p. 142. It may be remarked here, that in all cases where a justice of the peace is authorized to bind a person, or make him give security, he may do so by *recognizance*. (2 Arch. Just. 350.) And such cases may arise, under other circumstances than those mentioned in the text. Thus, the justice or justices before whom any person has been charged with any indictable offence, and witnesses in support of such charge have been examined, may bind, by *recognizance*, the prosecutor and every such witness to prosecute and give evidence. (See 11 & 12 Vict. c. 42,

ss. 20, 21, 22, 23, 34.) And in the case of any charge or complaint of any offence punishable by way of summary conviction, the justices may also so bind over the defendant to appear at the hearing. (See 11 & 12 Vict. c. 43, ss. 3, 9, 13, 16, 20.) See also 19 & 20 Vict. c. 16, ss. 8—10, 22, 23, and 25 & 26 Vict. c. 65, ss. 9, 17, as to *recognizances* in cases where an indictment or inquisition has been removed for trial to the Central Criminal Court. Et vide post, p. 377, as to *recognizances after conviction for felony or misdemeanor*. As to the forfeiture of *recognizances*, the following statutes and cases may be consulted, 3 Geo. 4, c. 46; 4 Geo. 4, c. 37; 7 & 8 Geo. 4, c. 64, s. 31; 3 & 4 Will. 4, c. 99; 2 & 3 Vict. c. 71, s. 45; 20 & 21 Vict. c. 43, s. 13; *R. v. Justices of West Riding*, 7 A. & E. 583; *R. v. Twyford*, 5 B. & Ad. 430.

(*g*) Where taken for appearance

[for the good behaviour,—then on condition that he shall demean and behave himself well, or be of good behaviour. either generally or specially, for the time therein limited; as for one or more years, or for life (*h*): and if the condition of such recognizance be broken, by any breach of the peace in the one case; or by any misbehaviour, in the other; the recognizance becomes forfeited or absolute;] and the party and his sureties become the Crown's absolute debtors, for the several sums in which they are respectively bound.

[Any justices of the peace, by virtue of their commission (and also those *ex officio* conservators of the peace, mentioned in a former volume,) may demand such security according to their own discretion (*i*): or it may be granted at the request of any subject, upon due cause shown,—provided such demandant be under the Crown's protection: for which reason it has been formerly doubted whether Jews, pagans, or persons convicted of a *præmunire*, were entitled thereto (*k*). Or if the justice is averse to act, it may be granted by a mandatory writ, called a *supplicavit*—issuing out of the court of Queen's Bench or Chancery—which will compel the justice to act as a ministerial, and not as a judicial, officer; and he must make a return of such writ, specifying his compliance, under his hand and seal (*l*). But this writ is seldom used; for when application is made to the superior courts, they usually take the recognizances there, under the directions of the statute 21 Jac. I. c. 8.] And in this case, as well as where application is made to the court of quarter sessions, it is founded upon *articles* first exhibited in court, and

in court (as it usually is), the justice must, by 3 Hen. 7, c. 1, certify the recognizance to the next session, there to remain of record. See *Willis v. Bridges*, 2 B. & Ald. 287.

(*h*) Hawk. P. C. b. 1, c. 60, s. 15.

(*i*) As to *ex officio* conservators of

the peace, vide sup. vol. II. p. 663. A secretary of state or privy councillor, however, cannot bind to keep the peace or good behaviour. (11 St. Tr. 317.)

(*k*) Hawk. P. C. b. 1, c. 60, s. 3.

(*l*) F. N. B. 80; *Clavering's case*, 2 P. Wms. 202.

supported by the oath of the exhibitant (*m*); the truth of which articles cannot be controverted (*n*). But where the parties live in the country at a distance from London, the Court of Queen's Bench will not in general entertain an application of this description; which it is usual, in such case, to make to a justice of the peace in the neighbourhood, or to the court of quarter sessions (*o*). A peer or peeress, however, [cannot be bound over in any other place than the Courts of Queen's Bench or Chancery; though a justice of the peace has a power to require sureties of any other person, being *compos mentis* and under the degree of nobility,—whether he be a fellow justice or other magistrate, or whether he be merely a private man (*p*). Wives may demand it against their husbands, or husbands (if necessary) against their wives (*q*). But *femes covert*, and infants, ought to find security by their friends only, and not to be bound themselves: for they are incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowledgments.]

Thus far, what has been said is applicable to both species of recognizances: for the *peace*, and for the *good behaviour*. [But as these two species of securities are in some respects different,—especially as to the cause of granting or the means of forfeiting them,—it may be useful next to consider them separately.

1. Any justice of the peace may *ex officio* bind] by recognizances, with sureties to keep the peace, all [who in his presence make any affray, or threaten to kill or beat one another; or who contend together with hot and angry words; or go about with unusual weapons or attendance, to the terror of the people. He may also bind all such as

(*m*) See *Ex parte Williams*, M'Clel. 493; 12 Price, 673; *Regina v. Mallinson*, 1 L. M. & P. 619.

(*n*) *R. v. Doharty*, 13 East, 171.

(*o*) *R. v. Waite*, 2 Burr. 780; *Chitty's Burn, Surety of the Peace*.

(*p*) *Hawk. P. C. b. 1, c. 60, s. 5*.

(*q*) *Sim's case*, 2 Stra. 1207.

[he knows to be common barrators; and such as are brought before him by the constable for a breach of the peace in his presence; and all such persons as having been before bound to the peace, have broken it, and forfeited their recognizances (*r*). Also wherever any private man has just cause to fear that another will burn his house; or do him a corporal injury, by killing, imprisoning, or beating him: or that he will procure others so to do;—he may demand surety of the peace against such person: and every justice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will show that he has just cause to be so by reason of the other's menaces, attempts, or having lain in wait for him (*s*); and will also further swear that he does not require such surety out of malice, or for mere vexation (*t*). This is called *swearing the peace* against another; and if the party does not find such sureties, he may immediately be committed till he does (*u*).] It is however provided by 16 & 17 Vict. c. 30, s. 3, that no person committed to prison for such cause, under any warrant or order of one justice of the peace, shall be detained there for a longer period than twelve calendar months.

[Such recognizance for keeping the peace, when given, may be forfeited by any actual violence,—or even an assault, or menace, to the terror of him who demanded it,—if it be a special recognizance. And, if the recognizance be general, then by any unlawful action whatever, that either is or tends to be a breach of the peace; or, more particularly, by any one of the many species of offences which were mentioned as crimes against the public peace, in the tenth chapter of this Book; or by any private violence, committed against any of the subjects of the Crown. But a bare trespass upon the lands or goods of another,—which is a ground for a civil action,—unless accompanied

(*r*) Hawk. P. C. ubi sup. s. 1.

(*t*) Hawk. P. C. ubi sup. s. 8.

(*s*) See *Ex parte Hulse*, 21 L. J., M. C. 21.

(*u*) *Ibid.* s. 9. See *Prickett v. Gratrex*, 8 Q. B. 1020.

[with a wilful breach of the peace, is no forfeiture of the recognizance (x). Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, so as to forfeit one's recognizance, (being looked upon to be merely the effect of unmeaning passion and heat,) unless they amount to a challenge to fight (y).

2. The other species—viz. a recognizance, with sureties, for the *good abearance* or *good behaviour*, includes security for the peace and somewhat more; we will therefore examine it, in the same manner as the other.

First, then, the justices are empowered by the statute, 34 Edward III. c. 1, to bind over to the good behaviour towards the sovereign and his people, all them *that be not of good fame*, wherever they be found: to the intent that the people be not troubled or endamaged; nor the peace diminished: nor merchants and others passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame*, it is holden, that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*; as for haunting bawdy houses with women of bad fame, or for keeping such women in his own home: or for words tending to scandalize the Government; or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day and wake in the night; common drunkards, whore masters; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statute,—as persons not of good fame; an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But if he commits a man for want of sureties, he must express the cause thereof

(x) Hawk. P. C. ubi sup. s. 25.

(y) Ibid. s. 22.

[with convenient certainty; and take care that such cause be a good one (*z*).] And a similar limitation as to the time of detention under the warrant or order of a single justice, is prescribed by 16 & 17 Vict. c. 30, s. 4, as just mentioned in reference to binding over to keep the peace.

[A recognizance for the good behaviour may be forfeited by all the same means, as one for the security of the peace may be: and also by some others;—as by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or by committing any of those acts of misbehaviour which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion, of that which perhaps may never actually happen (*a*); for though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.]

Such are the doctrines laid down in the books with respect to recognizances for *good behaviour*. In what manner, however, and to what extent the provisions of the 34 Edward III. ought at the present day to be enforced, may be doubtful: and justices, even at sessions, are recommended, by a learned writer on the subject, to refrain from acting under this statute, where no complaint, requiring such recognizance to be taken, has been made: except only in cases where a conviction for some offence of a dangerous kind has taken place; and the circumstances are such as to render a repetition of it, by the same offender, probable (*b*).

In reference to cases of *conviction*, additional facilities for the prevention of crime, by the use of recognizances for the peace and good behaviour, have been now afforded by the legislature. For a provision has been inserted in each of the Criminal Law Consolidation Acts of the year

(*z*) Hawk. P. C. b. 1, c. 62, s. 4.

(*b*) 2 Arch. Just. 454.

(*a*) Ibid. s. 5.

1861, to the following effect (c); viz., that whenever any person shall be convicted of *any indictable misdemeanor*, punishable under any of those statutes respectively, the court may, if it shall think fit, in addition to or in lieu of any of the punishments authorized by the Act, fine the offender and require him to enter into his own recognizances and to find sureties (both or either), for keeping the peace and being of good behaviour; and in case of *any felony*, punishable under any of them respectively, may require the offender to enter into such recognizances and to find sureties (both or either), in addition to any punishment authorized by the Act under which he has been convicted. There is however a proviso that no person is to be imprisoned under this clause, for not finding sureties, for any period exceeding one year.

It is also enacted by 24 & 25 Vict. c. 100, s. 43, that on a *summary conviction* for an aggravated assault on any female or male child under the age of fourteen (d), the offender may be bound over by the justices convicting, to keep the peace or to good behaviour, for the period of six months after the expiration of his sentence.

(c) See 24 & 25 Vict. c. 96, s. 99, s. 38; c. 100, s. 71.
117; c. 97, s. 73; c. 98, s. 51; c. (d) Vide post, p. 413.

CHAPTER XIV.

OF COURTS OF A CRIMINAL JURISDICTION.

[THE sixth and last object of our inquiries (*a*) will be the method of *inflicting* those punishments, which the law has annexed to particular offences; and which, in this treatise, have been constantly subjoined to the description of the crime itself.] In the discussion of which, we shall, in the first place, point out the several courts of criminal jurisdiction wherein offenders may be prosecuted to punishment: and then explain the several proceedings which may be had therein. And [in reckoning up the several courts of criminal jurisdiction, we shall begin with an account of such as are of a public and general jurisdiction throughout the whole realm: and afterwards proceed to such as are only of a private and special jurisdiction, and confined to some particular parts of the kingdom.

First. As to the criminal courts of *public and general jurisdiction*;—with regard to which we shall, in one respect, pursue a different order, from that in which we considered the civil tribunals. For there, as the several courts had a gradual subordination to each other,—the superior correcting and reforming the errors of the inferior;~~—~~ it seemed proper to begin with the lowest, and to ascend gradually to the courts of appeal, or those of the most extensive powers (*b*). But as it is contrary to the genius and spirit of the law of England to suffer any man twice to be tried for

(*a*) Vide sup. p. 86.

(*b*) Vide sup. vol. III. p. 389 et seq.

[the same offence in a criminal way, especially if acquitted upon the first trial,—therefore these criminal courts may be said to be all independent of each other; at least so far as that the sentence of the lowest of them, can never be controlled or reversed by the highest jurisdiction in the kingdom, unless for error in matter of law (c); though sometimes causes may be removed from one to the other, before trial. And, therefore, as in these courts of criminal cognizance, there is not the same chain and dependence as in the others, it is proposed to rank them according to their dignity, and begin with the highest of all, viz.—

1. The High Court of *Parliament*; which is the supreme court in the kingdom, not only for the making but also for the execution of laws, by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for Acts of parliament to attain particular persons of treason or felony,—or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose,—we speak not of them; such being to all intents and purposes new laws, made *pro re natâ*, and by no means an execution of such as are already in being. But an impeachment before the lords, by the commons of Great Britain in parliament, is a prosecution of the already known and established law, and has been frequently put into practice,—being a presentment to the most high and supreme court of criminal jurisdiction, by the most solemn grand inquest of the whole kingdom (d). A commoner cannot, however, be impeached before the lords for any capital offence, but only for high misdemeanors (e); a peer may be so impeached, for any crime.

(c) As to arrest or reversal of judgment, vide post, cc. xxiii. xxiv. As to reserving questions of law, arising at assizes or sessions, for the consideration of the judges, see 11 & 12 Vict. c. 78. And as to cases stated by justices of the peace, on the application of any person aggrieved by their determination in

point of law, in the exercise of their summary jurisdiction, see 20 & 21 Vict. c. 43.

(d) 1 Hale, P. C. 159.

(e) When, in the fourth year of Edward the third, the king demanded the earls, barons and peers to give judgment against Simon de Beresford, who had been a notorious accomplice

[And they usually, (in cases of an impeachment of a peer for treason,) address the Crown to appoint a Lord High Steward, for the greater dignity and regularity of the proceedings; which High Steward was formerly elected by the peers themselves, though he was generally commissioned

in the treasons of Roger Earl of Mortimer, they came before the king in parliament and said all with one voice, that the said Simon was ~~not~~ their *peer*; and therefore they were not bound to judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge and give judgment against him, the following protest and proviso was entered in the parliament roll:—"And it is assented and recorded by our lord the king, and all the great men in full parliament, that albeit the peers as judges of the parliament, have taken upon them, in the presence of our lord the king, to make and render the said judgment; yet the peers who now are, or shall be in time to come, be not bound or charged to render judgment upon others than peers; nor that the peers of the land have power to do this, but thereof ought ever to be discharged and acquitted; and that the aforesaid judgment now rendered, be not drawn to example or consequence in time to come, whereby the said peers may be charged hereafter to judge others than their peers, contrary to the laws of the land, if the like case happen, which God forbid." (Rot. Parl. 4 Edw. 3, n. 2 and 6; 2 Brad. Hist. 190; Selden, Judic. in Parl. c. 1.) But Mr. Christian says in his edition of Blackstone, (vol. iv.

p. 260,) that according to the last resolution of the house of lords, a commoner *may* be impeached for a capital offence. And he states, on the authority of the Journals of the House of Lords, the following instance. On the 26th of June, 1689, Sir Adam Blair, and four other commoners, were impeached for high treason, in having published a proclamation of James the second. On the 2nd of July a long report of precedents was produced, and a question was put to the judges, whether the record 4 Edw. 3, n. 6, was a statute. They answered, as it appeared to them by the copy, they believed it to be a statute; but if they saw the roll itself, they could be more positive. It was then moved to ask the judges (but the motion was negatived), whether by this record the lords were barred from trying a commoner for a capital crime upon an impeachment of the commons. And the lords immediately resolved to proceed in this impeachment, notwithstanding the parties were commoners, and charged with high treason. (14 Lords' Journ. p. 260.) Mr. Christian adds that this impeachment was not prosecuted with effect, on account of an intervening dissolution of the parliament. See also Lives of the Chancellors, by Lord Campbell, vol. iii. p. 357, n., and the observations of Mr. May on this subject, in his Practice of Parliament.

[by the sovereign; but it hath] in modern times '[been strenuously maintained, that the appointment of a High Steward in such cases is not indispensably necessary, but that the House may proceed without one (e). The articles of impeachment are a kind of bill of indictment, found by the house of commons, and afterwards tried by the house of lords; who are, in cases of misdemeanor, considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the antient Germans; who, in their great councils, sometimes tried capital accusations relating to the public: "*licet apud consilium accusare quoque, et discrimen capitis intendere*" (f). And it has a peculiar propriety in the English constitution, which has much improved upon the antient model, imported hither from the continent. For, though, in general, the union of the legislative and judicial powers ought to be most carefully avoided: yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people; and be guilty of such crimes as the ordinary magistrate, either dares not or cannot punish. Of these the representatives of the people, or house of commons, cannot properly *judge*; because their constituents are the parties injured: and therefore can only *impeach*. But before what court shall this impeachment be tried? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser. Reason, therefore, will suggest, that this branch of the legislature, which represents the people, must bring its charge before the other branch,—which consists of the nobility,—who have neither the same interests nor the same passions as popular assemblies (g). This is a vast superiority, which the constitution of this island enjoys, over those of the Grecian or Roman republics; where the people were, at the same time, both

(e) As to the appointment of the High Steward, see 1 Hale, P. C. 350; Lords' Journ. 12th May, 1679; Com. Journ. 15th May, 1679; Fost.

142, &c.

(f) Tacit. De Mor. Germ. 12.

(g) Montesq. Sp. L. xi. 6.

[accusers and judges. It is proper that the nobility should judge, to ensure justice to the accused ; as it is proper that the people should accuse, to ensure justice to the commonwealth. And, therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very singular nature ; which was insisted upon by the house of commons in the case of the Earl of Danby, in the reign of Charles the second (*h*) ;] and which is now established by the Act of Settlement (*i*). This is, [that no pardon under the Great Seal shall be pleadable to an impeachment by the commons of Great Britain in parliament,] so as to prevent its further prosecution (*h*) ; though such a pardon would be pleadable, (as we shall see hereafter,) in the ordinary case of an indictment.

Before the House of Peers also, during the session of parliament, is tried any peer or peeress against whom an *indictment* for treason or felony, or for misprision of either, is found by a grand jury of freeholders in the Queen's Bench (or at the assizes before a judge of *oyer and terminer*,)—such indictment being removed hither by writ of *certiorari* (*l*).

2. [The Court of the *Lord High Steward* of Great Britain, is a court instituted for] the trial, during the *recess* of parliament, of peers or peeresses [indicted for treason or felony (*m*) ; or for misprision of either (*n*).] The office of this great magistrate is very antient ; and was formerly hereditary, or at least held for life, or *dum bene se gesserit* : but now it is usually, and hath been for many centuries past (*o*), granted *pro hac vice* only ; and it hath been the constant practice, (and therefore seems now to have become necessary,) to grant it to a lord of parliament,

(*h*) Com. Journ. 5th May, 1679.

(*i*) 12 & 13 Will. 3, c. 2.

(*k*) As to pardons, vide post, c. xxv.

(*l*) 4 Bl. Com. p. 262 ; Bac. Ab. Courts (G) ; Com. Dig. Parliament (I. 13). The last occasion of such a trial was in the year 1811, when the Earl of Cardigan was tried be-

fore the House of Lords for felony, in shooting at Captain Tuckett. An account of the proceedings, will be found in the 83rd volume of the Annual Register.

(*m*) 4 Inst. 58 ; Hawk. P. C. b. 2, c. 2, s. 44 ; 2 Jon. 54.

(*n*) R. v. Lord Vaux, 1 Bulst. 198.

(*o*) Pryn. on 4 Inst. 46.

[else he is incapable to try such delinquent peer (*p*). When, therefore,] an indictment has been found (during such recess) in the Queen's Bench or at the assizes against one having the privilege of peerage, [it is to be removed by a writ of *certiorari* into the Court of the Lord High Steward: which, only, has power to determine it (*q*).] But this is only in case the offence be of the description before mentioned, viz. treason, felony, or misprision of treason or felony; for if it be of any other kind, the privilege does not exist, and the peer must be tried by jury in the court in which the indictment is found (*r*). [A peer may plead a pardon before the court of Queen's Bench: and the judges have power to allow it; in order to prevent the trouble of appointing a High Steward, merely for the purpose of receiving such plea. But he may not plead, in that inferior court, any other plea; as *guilty* or *not guilty*, of the indictment; but only in the court of the Lord High Steward. Because in consequence of such plea, it is possible that judgment of death might be awarded against him. The sovereign, therefore, in case a peer be indicted for treason, felony, or misprision, creates a Lord High Steward, *pro hac vice*, by commission under the Great Seal; which recites the indictment so found, and gives his Grace power to receive and try it, *secundum legem et con-*

(*p*) "*Quand un seigneur de parlement serra arreint de treason ou felony, le roy par ses lettres patentes fera un grand et sage seigneur d'estre le grand seneschal d'Angleterre: qui doit faire un precept, pur faire venir xx seigneurs, ou xviij,*" &c. (Yearb. 13 Hen. 8, 11.) See Staundf. P. C. 152; 3 Inst. 28; 4 Inst. 59; Hawk. P. C. b. 2, c. 2; Barr. 234.

(*q*) Lord Coke says, (3 Inst. 30,) "that this privilege cannot be "waived by the peer indicted;" but Hawkins (P. C. b. 2, c. 44, s. 19) holds that it is waived if he puts himself upon his country; that is,

pleads not guilty, and refers the issue to a trial by jury. By 19 & 20 Vict. c. 16, the Court of Queen's Bench is empowered to order certain indictments to be tried in the Central Criminal Court; but, by the twenty-ninth section of the Act, it is not to apply to any indictment or inquisition charging any peer or peeress (or other person claiming the privilege of peerage) with any offence not now lawfully triable at any court of oyer and terminer or gaol delivery.

(*r*) 2 Inst. 49; 3 Inst. 28, 30; R. v. Lord Vaux, 1 Bulst. 197.

[*suetudinem Angliæ*. Then, when the indictment is regularly removed by writ of *certiorari*, commanding the inferior court to certify it up to him,—the Lord High Steward directs a precept to a serjeant-at-arms, to summon the lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty, selected from the body of the peers. Afterwards the number came to be indefinite; and the custom then was, for the Lord High Steward to summon as many as he thought proper, (but latterly not less than twenty-three;) and that those lords only should sit upon the trial(s): which threw a monstrous weight into the hands of the Crown, and this its great officer, of selecting only such peers as the then predominant party should most approve of. And accordingly, when the Earl of Clarendon fell into disgrace with Charles the second, there was a design formed to prorogue the parliament, in order to try him by a select number of peers; it being doubted whether the whole house could be induced to fall in with the views of the court (*t*).

But now by statute 7 Will. III. c. 3, upon all trials of peers or peeresses for treason or misprision,—all the peers who have a right to sit and vote in parliament shall be summoned, at least twenty days before such trial, to appear and vote therein: and every lord appearing,] and taking the proper oaths, [shall vote in the trial of such peer (*u*).] The decision in this court, is by the majority; but a majority cannot convict, unless it consists of twelve or more (*x*).

[During the session of parliament, the trial of an in-

(*s*) Kelynge, 56.

(*t*) Carte's Life of Ormonde, vol. ii.

(*u*) Mr. Christian, in his edition of Blackstone, remarks that in as much as a peer cannot have the benefit of a challenge like a commoner, (1 Harg. St. Tr. 198, 388.)

it is somewhat surprising that this manifest improvement of the law and constitution, was not extended to trials of peers for *all* felonies in the court of the lord high steward.

(*x*) Christian's Blackstone, vol. iv. p. 262, note.

[dicted peer, is not in the court of the Lord High Steward,] but (as already mentioned) before the peers in the high court of parliament (*y*). [It is true; a Lord High Steward is always appointed in that case, to regulate and add weight to the proceedings; but he is rather in the nature of a speaker *pro tempore*, or chairman of the court, than the judge of it: for the collective body, the peers, are therein the judges both of law and fact; and the High Steward has a vote with the rest, in right of his peerage.] But in his own court the Lord High Steward [is the sole judge of matters of law, as the lords triors are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial (*z*). And upon the conviction and attainder of a peer for murder, in full parliament,—it hath been holden by the judges, that in case the day appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament (during its sitting), though no High Steward be existing; or, (in the recess of parliament,) by the Court of Queen's Bench, the record being removed into that court (*a*).

It has been a point of some controversy, whether the bishops have now a right to sit in the court of the Lord High Steward, to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of King William (*b*), “all peers who have a right to sit and vote in parliament,” but the expression had been much clearer if it had been “all *lords*,” and not “all ~~peers~~,” for though bishops, on account of the baronies annexed to their bishoprics, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility; and perhaps this word might be inserted purposely with a view to exclude them. However, there is

(*y*) Vide sup. p. 379; Fost. 141.

(*z*) St. Tr. vol. iv. 214, 232, 233.

See Lord Campbell's Lives of the

Chancellors, vol. iii. p. 557, n.

(*a*) Fost. C. L. 139.

(*b*) 7 Will. 3, c. 3.

[no instance of their sitting on trials for capital offences, even upon impeachments and indictments in full parliament, much less in the court we are now treating of: for indeed they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable, that in the eleventh chapter of the Constitutions of Clarendon, made in the parliament of the eleventh year of Henry the second, they are expressly excused, rather than excluded, from sitting and voting on trials, when they come to concern life or limb: “*episcopi, sicut cæteri barones, debent interesse judiciis cum baronibus, quousque perveniatur ad diminutionem membrorum, vel ad mortem:*” and Becket’s quarrel with the king hereupon, was not on account of the exception, (which was agreeable to the canon law,) but of the general rule, which compelled the bishops to attend at all. And the determination of the house of lords in the Earl of Danby’s case (c), which has ever since been adhered to, is consonant to these constitutions: “that the lords spiritual have a right to stay and sit in court in capital cases, “till the court proceeds to the vote of guilty, or not “guilty (d).” It must be noted that this resolution extends only to trials *in full parliament*; for to the court of the Lord High Steward, (in which no vote can be given, but merely that of guilty or not guilty,) no bishop, as such, ever was or could be summoned; and though the statute of King William regulates the proceedings in that court as well as in the court of parliament, yet it never intended to new-model or alter its constitution: and consequently does not give the lords spiritual any right in cases of blood, which they had not before (e). • And what makes their exclusion more reasonable is, that they have no right to be tried themselves in the court of the Lord High Steward (f); and therefore, surely, ought not to be judges

(c) Lords’ Journ. 15 May, 1679.

(d) This applies, it will be observed, only to judicial proceedings. Where the proceeding is a legislative one, as in the case of a bill of attainder, the bishops are excluded

at no stage of it, though it affect the life of the party attainted. (See May, Pr. Parl. 484.)

(e) Forst. 248.

(f) Bro. Ab. tit. Trial, 142.

[there. For the privilege of being thus tried depends upon nobility, rather than a seat in the house; as appears from the trial of popish lords, while incapable of a seat there; of lords under age;] and, (since the union with Scotland,) [of the Scots nobility, though not in the number of the sixteen representative peers: and from the trial of females; such as the queen consort or dowager, and of all peeresses by birth; and of peeresses by marriage also, unless they have, when dowagers, disparaged themselves by taking a commoner to their second husband.

3. The Court of *Queen's Bench*, concerning the nature of which we partly inquired in the preceding Book, was, we may remember, divided into a *Crown* side, and a *plea* side (*g*). And on the Crown side, or Crown office, it takes cognizance of all criminal causes—from treason, down to the most trivial misdemeanor or breach of the peace (*h*). Into this court all indictments from all inferior courts may be removed by writ of *certiorari*:] but (under the provisions of a recent statute) the removal can only take place where the indictment is against a body corporate not authorized to appear by attorney in the court below, or else where it is made to appear to the Court of Queen's Bench, or a judge thereof, by the party applying for the writ, that a fair and impartial trial cannot be had in the court below; or that a question of law of more than usual difficulty and importance is likely to arise upon the trial; or that a view of premises, or a special jury, may be required for the satisfactory trial of the case (*i*). The manner of trial in the Queen's Bench is in felony or treason, at bar (*j*); and in misdemeanors, either at bar (in cases of sufficient consequence) or at *nisi prius* (*k*). [The

(*g*) Vide sup. vol. III. p. 408.

(*h*) By 23 & 24 Vict. c. 54, the office of assistant-master of the crown office is abolished; and the officers on the crown side of the court, are to be the queen's coroner and attorney, and one master.

(*i*) 16 & 17 Vict. c. 30, s. 4. As to the leave and recognizance required before the writ is allowed, see also post, p. 470.

(*j*) Woolrych's Crim. Law, p. 162.

(*k*) Where the record is in the Queen's Bench, either prosecutor or

[judges of the court are the supreme coroners of the kingdom. And the court itself is the principal court of criminal jurisdiction, (though the two former, we have mentioned, are of greater dignity,) known to the laws of England. For which reason, by the coming of the Court of Queen's Bench into any county, (as it was removed to Oxford on account of the sickness in 1665,) all former commissions of *oyer and terminer*, and general gaol delivery, are at once absorbed and determined *ipso facto* (l): in the same manner as by the old Gothic and Saxon constitutions, "*obtinuit quiescere omnia inferiora judicia, dicente jus rege*" (m).

Into this Court of Queen's Bench hath reverted all that was good and salutary of the jurisdiction of the court of *Star-chamber*, *camera stellata* (n); which was a court of

defendant may apply for a *special* jury. This, however, is only in cases of misdemeanor, and not of treason or felony (6 Geo. 4, c. 50, s. 30). It may be remarked that, in certain cases, the trial is neither at bar nor at *nisi prius*, but at the *Central Criminal Court*, under the provisions of 19 & 20 Vict. c. 16 (vide post, p. 472). As to trials at bar and *nisi prius* in civil cases, vide sup. vol. III. pp. 431, 582, 614.

(l) But by the 25 Geo. 3, c. 18, it is enacted, that the session of *oyer and terminer*, and gaol delivery of the gaol of Newgate, for the county of Middlesex, shall not be discontinued on account of the commencement of the Term, and the sitting of the Court of Queen's Bench, at Westminster; but may be continued till the business is concluded. And the 32 Geo. 3, c. 48, was passed to continue in like manner the sessions of the peace, and of *oyer and terminer*, held before the justices of the peace for the county of Middlesex. And see 9 Geo. 4, c. 9, enabling the justices of the

peace for the city of Westminster, also, to hold their sessions during Term and the sitting of the Court of Queen's Bench.

(m) Stiernh. l. 1, c. 2.

(n) This is said (Lamb. Arch. 154) to have been so called, either from the Saxon word *ſteonjan*, to steer or govern; or from its punishing the *crimen stellionatus*, or cozenage; or because the room wherein it sat, the old council chamber of the palace of Westminster (Lamb. 148), was full of windows; or (to which Sir Edward Coke, 4 Inst. 66, accedes) because *haply* the roof thereof was at first garnished with gilded stars. As all these, (says Blackstone, vol. iv. p. 26, in notes,) are merely conjectures (for no stars are now in the roof, nor are any said to have remained there so late as the reign of Elizabeth), it may be allowable to propose another conjectural etymology, as plausible perhaps as any of them. It is well known that, before the banishment of the Jews under Edward the first, their contracts and obligations were

[very antient original (*o*),—but new modelled by statutes 3 Henry VII. c. 1, and 21 Henry VIII. c. 20,—consisting of divers lords spiritual and temporal, (being privy counsellors,) together with two judges of the courts of common law; without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehaviour of sheriffs, and other notorious misdemeanors, contrary to the laws of the land. Yet this was afterwards, as Lord Clarendon informs us, stretched “to the asserting of all “proclamations and orders of state; to the vindicating

denominated in our antient records *starra* or *starrs*, from a corruption of the Hebrew word *shetâr*, a covenant (Tovey's Angl. Judaic. 32; Seld. Tit. of Hon. ii. 34; Uxor. Ebraic. i. 14). These *starrs*, by an ordinance of Richard the first, preserved by Hoveden, were commanded to be enrolled, and deposited in chests under three keys in certain places: one, and the most considerable, of which was in the king's Exchequer at Westminster; and no *starr* was allowed to be valid, unless it was found in some of the said repositories (Memorand. in Scacc. P. in the sixth year of Edward the first, prefixed to Maynard's Year Book of Edward the second, fol. 8; Madox, Hist. Exch. c. 7, ss. 4, 5, 6). The room at the Exchequer where the chests containing these *starrs* were kept, was probably called the *starr-chamber*; and when the Jews were expelled the kingdom, was applied to the use of the king's council, sitting in their judicial capacity. To confirm this, the first time the *starr-chamber* is mentioned in any record, it is said to have been situated near the receipt of the Exchequer at Westminster; (the king's council, his chancellor, treasurer, justices and other sages, were assembled “*en la chambre des esteilles pres la*

resceipt at Westminster”—Claus. 41 Edw. 3, m. 13). For in process of time, when the meaning of the Jewish *starrs* was forgotten, the word *star-chamber* was naturally rendered in law French *la chambre des esteilles*, and in law Latin *camera stellata*; which continued to be the style in Latin, till the dissolution of that court.

It is suggested by Mr. Christian (Bl. Com. vol. iv. p. 267), in reference to the above note of Blackstone, that in one of the statutes of the University of Cambridge, the antiquity of which is not known, the word *starrum* is twice used for a schedule or inventory. The statute is entitled *De computatione procuratorum*, and it directs that “*in fine computi fiat starrum per modum dividendæ, in quo ponentur omnia remanentia in communi cistâ, tam pignora quam pecunia, ac etiam arreragia et debita, ita quod omnibus constare potuit evidenter, in quo statu tunc universitas fuerit, quoad bona, &c.*”—(Stat. Acad. Cant. p. 32.) Such inventories would be made at the king's Exchequer; and the room where they were deposited would probably be called the *star-chamber*.

(*o*) Lamb. Arch. 156.

[“ of illegal commissions, and grants of monopolies; holding for honourable that which pleased, and for just that which profited; and becoming both a court of law to determine civil rights, and a court of revenue to enrich the treasury; the council table by proclamations enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited; and the Star-Chamber, which consisted of the same persons in different rooms, censuring the breach and disobedience to those proclamations by very great fines, imprisonments, and corporal severities; so that any disrespect to any acts of state, or to the persons of statesmen, was in no time more penal, and the foundations of right never more in danger to be destroyed (*p*).” For which reasons it was finally abolished by statute 16 Car. I. c. 10, to the general joy of the whole nation (*q*).]

4. [The High Court of *Admiralty*, held before the lord high admiral of England, or his deputy styled the *judge of the admiralty*,—is not only a court of civil, but also of criminal jurisdiction (*r*). This court hath cognizance of all crimes and offences committed either upon the sea

(*p*) Hist. of Rebellion, b. 1 and 3.

(*q*) The just odium into which this tribunal had fallen before its dissolution has been the occasion that few memorials have reached us of its nature, jurisdiction and practice; except such as, on account of their enormous oppression, are recorded in the historians of the times. There are, however, to be met with some reports of its proceedings in Dyer, Croke, Coke, and other reporters of that age; and some in manuscript, of which Sir W. Blackstone possessed two: one from the fortieth year of Elizabeth, to the thirteenth of James the first; the other for the first three years of King Charles. And there is in the British Museum (Harl. MS. vol. 1, no. 1226) a very full, methodical

and accurate account of the constitution and course of this court, compiled by William Hudson, of Gray's Inn, an eminent practitioner therein; and a short account of the same, with copies of all its process, may also be found in 18 Rym. Fœd. 192, &c. Hudson's Treatise of the Court of Star-chamber, is now published at the beginning of the second volume of *Collectanea Juridica*.

(*r*) 4 Inst. 134, 147. As to the jurisdiction of the Court of Admiralty in general, vide sup. vol. III. p. 452 et seq. By 20 & 21 Vict. c. 77, s. 10, the judge of this court may, on the next vacancy, be the same person as the judge of the new Court of Probate.

[or on the coasts, out of the body or extent of any English county; and by stat. 15 Ric. II. c. 3, of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens; such as are the ports of London and Gloucester, though they lie at a great distance from the sea.] And while this court, in the exercise of its criminal jurisdiction, [proceeded without jury, in a method much conformed to the civil law, the exercise of such jurisdiction was contrary to the genius of the law of England: insomuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers. And besides, as innocent persons might thus fall a sacrifice to the caprice of a single man, so very gross offenders might, and did frequently, escape punishment; for the rule of the civil law is, that no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves. This was accordingly always a great offence to the English nation; and therefore, in the eighth year of Henry the sixth, it was endeavoured to apply a remedy in parliament; which then miscarried for want of the royal assent. However, by the statute 28 Hen. VIII. c. 15, it was enacted, that] all treasons, felonies, robberies, murders, and confederacies on the sea, or within the jurisdiction of the admiralty, [should be tried by commissioners of oyer and terminer under the Great Seal: viz. the admiral, or his deputy, and three or four more, (among whom two common law judges are usually appointed;) and that the indictment being first found by a grand jury of twelve men, should be afterwards tried by a petty jury; and that the course of proceedings should be according to the law of the land.] By 39 Geo. III. c. 37, it was afterwards declared and enacted, that all offences committed on the high seas are offences of the same nature, and liable to the same punishments, as if committed on shore; and may be tried as ap-

pointed by the 28 Hen. VIII. c. 15: and by 46 Geo. III. c. 54, that all offences committed within the jurisdiction of the admiralty may be determined according to the common law, in any of his majesty's islands or dominions, under the royal commission, in like manner as is provided by the statute of Henry the eighth. It is under these authorities that offences within the jurisdiction of the admiralty are now triable(*t*); but their trial in England is also regulated by modern statutes, and particularly by 4 & 5 Will. IV. c. 36, 7 & 8 Vict. c. 2, and 24 & 25 Vict. cc. 96, 97, 98, 99, 100. By 4 & 5 Will. IV. c. 36—which first established the “Central Criminal Court,” for offences committed in the metropolis and certain parts adjoining (*u*),—the judge of the admiralty is made, (together with the lord mayor of London, the common law judges, and others,) one of the judges of the central criminal court: and it is provided (s. 22), that under any commission of oyer and terminer and gaol delivery, to be issued under the authority of that Act,—such judges, or any two or more of them, may hear and determine any offences committed or alleged to be committed on the high seas, and other places within the jurisdiction of the admiralty; and may deliver the gaol of Newgate, of any person detained therein for such offence. By the 7 & 8 Vict. c. 2 (*x*), reciting that it is expedient that provision should be made for the trial of persons charged with offences committed at sea, or within the admiralty jurisdiction, without issuing any special commission as required by 28 Hen.

(*t*) See also 45 Geo. 3, c. 72, s. 114 et seq. And 12 & 13 Vict. c. 96, enacting that persons charged in any *colony* with offences committed on the seas, may be dealt with as though the offence had been committed within the local jurisdiction of such colony. See also 18 & 19 Vict. c. 91, s. 21. As to expenses of prosecution in the Court of Admiralty, see 7 Geo. 4, c. 64, s. 27.

(*u*) As to this court, vide post, p. 395.

(*x*) As to this provision, see *R. v. Serva*, 2 C. & R. 53; *R. v. Jones*, ib. 165; *The Queen v. Cunningham*, 28 L. J. (M. C.) 66. As to the power of justices of the peace, to issue warrants against persons charged with offences committed within the Admiralty jurisdiction, see 11 & 12 Vict. c. 42, s. 8.

VIII. c. 15,—it is enacted, that any justices of assize, oyer and terminer, or gaol delivery, may also inquire of and determine all offences so committed; and that all indictments found, and trials and other proceedings before the said justices in such cases, shall be valid. And in each of the statutes of 24 & 25 Victoria above mentioned, (the Criminal Consolidation Acts, 1861,) there is contained a clause to the effect that all indictable offences mentioned in those Acts respectively (comprising larceny, malicious injuries to property, forgery, coinage offences and offences against the person) committed within the jurisdiction of the admiralty of England or Ireland,—shall be deemed to be offences of the same nature, and liable to the same punishment, as if they had been committed upon the land in England or Ireland; and may be dealt with and tried in any place in which the offender shall be apprehended or be in custody (y).

[These four courts may be held in any part of the kingdom; and their jurisdiction extends over crimes that arise throughout the whole of it, from one end to the other;] as was also the case with regard to 5, the now disused Court of *Chivalry* (z). [What follow are also of a general nature; but yet are of a local jurisdiction, and confined to particular districts. Of which species are,—

6, 7. The Courts of *Oyer and Terminer*, and *General Gaol Delivery* (a); which are held before the royal commissioners,—among whom are usually two judges of the courts at Westminster,—twice in the year in every county of the kingdom (b);] with an exception to be presently stated, as to the metropolis and its vicinity. [These courts were mentioned in the preceding Book (c): and we then

(y) See 24 & 25 Vict. c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36; and c. 100, s. 68. By c. 94, s. 9, a similar provision is inserted with respect to the trial of any persons becoming *accessory* to any felony within the Admiralty jurisdiction.

(z) Vide sup. vol. III. p. 459, n. (l).

(a) 4 Inst. 152, 168; 2 Hale, P. C. 22, 32; Hawk. P. C. b. 2, c. 5, s. 6.

(b) Vide post, p. 395, n. (o).

(c) Vide sup. vol. III. p. 430 et seq.

[observed, that in what is usually called *the assizes*, the judges sit by virtue of four several authorities;] viz., the commission of the peace, the commission of oyer and terminer, the commission of general gaol delivery, and the commission of *nisi prius*; [one of which, (that of *nisi prius*), being principally of a civil nature, was then explained at large.] The authority by the commission of the peace has also been treated of, when we inquired into the nature and office of a justice of the peace (*d*); and in addition to what was there stated we may remark, [that all the justices of the peace of any county, wherein the assizes are held, are bound by law to attend them,] upon due notice given by the sheriff (*e*): [or else are liable to a fine: in order to return recognizances, &c.: and to assist the judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned by way of previous examination.] But the commission of *oyer and terminer* gives the judges authority [to hear and determine all treasons, felonies and misdemeanors] committed within the county. [This is directed to the judges and several others, or any two of them (*f*); but only the judges, or serjeants at law,] the queen's counsel, and barristers with a patent of precedence (*g*), named in the commissions, or in the writs of association and *si non omnes* with which they are accompanied (*h*), [are of the *quorum*; so that the rest cannot act without the presence of one of them.] Under the commission of *oyer and terminer*, persons may be tried whether they are in gaol or at large (*i*); but the words are [to "inquire, hear, and determine:" so that by virtue of this ~~commission~~, the judges can only proceed upon an indictment found at the

(*d*) Vide sup. vol. II. p. 665.

(*e*) Cro. Cir. c. 3.

(*f*) In Middlesex the commission is directed to any *four* of them. 4 Chit. Crim. Law, 145; 1 Saund. 249 (a).

(*g*) 13 & 14 Vict. c. 25.

(*h*) As to writs of *association* and *si non omnes*, vide sup. vol. III. p. 434. The forms of these writs, and also of the several commissions, will be found in 4 Chit. Crim. Law, 129, &c.

(*i*) 1 Chit. Crim. Law, 144.

[same assizes; for they must first inquire, by means of the grand jury or inquest, before they are empowered to hear and determine by the help of the petit jury (*j*). Therefore they have besides a commission of general *gaol delivery*: which empowers them to try, and deliver every prisoner, who shall be in the gaol when they arrive at the circuit town (*k*); whenever or before whomsoever indicted, or for whatever crime committed (*l*). It was antiently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de bono et malo* (*m*); but these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their stead. So that, one way or other, the gaols are in general cleared, and all prisoners tried, punished, or delivered, at least twice in every year,—a constitution of singular use and excellence. Sometimes, also, upon urgent occasions, the sovereign issues a special or extraordinary commission of oyer and terminer and gaol delivery, confined to those offences which stand in need of immediate inquiry and punishment; upon which the course of proceeding is much the same, as upon general and ordinary commissions (*n*).]

What has been stated applies to courts of oyer and terminer and gaol delivery throughout the realm at large; but for the metropolis and adjacent parts, a different constitution is provided. For by 4 & 5 Will. IV. c. 36, a new court was established for trial of offences committed in London, Middlesex, and certain suburban parts of Essex, Kent, and Surrey (*o*);—called *the Central Criminal*

(*j*) Hawk. P. C. b. 2, c. 5, s. 31.

(*k*) That is, either in actual custody, or out on bail, and so in gaol by construction of law. (1 Chit. Crim. Law, 146.)

(*l*) 2 Hale, P. C. 32, 34.

(*m*) 2 Inst. 43.

(*n*) Of late years the issue of commissions in the vacation after Michaelmas Term,—in order to

effect the more speedy trial of prisoners not triable at the sessions,—has become a usual practice, and is called the *winter* circuit.

(*o*) Indictments found at the different sessions of the peace, held within the jurisdiction of the Central Criminal Court, may be removed to that court by *certiorari* (4 & 5 Will. 4, c. 36, s. 16). As to the trial in

Court (p); the judges or commissioners whereof are the lord mayor of London; the Lord Chancellor or lord keeper; the judges of the courts at Westminster; the judge of the admiralty; the dean of the arches; the aldermen of London; the recorder and common serjeant of London; the judge of the sheriff's court there; any person who has been Lord Chancellor or lord keeper, or a judge of any of the courts at Westminster; and such others as the Crown shall from time to time appoint (*q*). And it is provided (sect. 2), that the Crown may issue its commission of oyer and terminer and gaol delivery to such court; and that the said judges, or any two or more of them, shall hold a session in the city of London or suburbs thereof, at least twelve times in every year (and oftener if need be),—such times to be fixed by General Orders of the said court; which Orders any eight or more of the judges of the courts at Westminster, are empowered from time to time to make (*r*).

that court of offences out of its jurisdiction, by order of the Queen's Bench, under 19 & 20 Vict. c. 16, and 25 & 26 Vict. c. 65, *vide post*, p. 472.

(*p*) Before the establishment of the Central Criminal Court, there existed "the court of the Sessions house in the Old Bailey," where the sessions of oyer and terminer and general gaol delivery of Newgate, for the city of London and the county of Middlesex, were holden eight times in the year. The gaol for such city and county (*vide sup.* vol. III. p. 236), is the *gaol of Newgate*; to which prison are committed all persons who are to take their trial at the Central Criminal Court, wherever their offences may have been committed. It may be remarked, that by 4 & 5 Will. 4, c. 36, s. 13, it was required that no indictment should be presented before the grand jury of the Central Crimi-

nal Court, unless the party prosecuting first entered into recognizances to prosecute, but this enactment was repealed by 9 & 10 Vict. c. 24, s. 2. By 19 & 20 Vict. c. 16, ss. 22, 23, however, the court is enabled, in cases ordered by the Queen's Bench, to be tried there under that Act, to require (if it see fit) either the person charged, or the prosecutor and witnesses, to enter into recognizances. And see the provisions contained in 22 & 23 Vict. c. 17, in reference to certain offences mentioned, *post*, p. 441.

(*q*) 4 & 5 Will. 4, c. 36, s. 1. Among the persons named in the text, those who usually sit to try prisoners in the Central Criminal Court, are certain of the judges of the superior courts of law, the recorder, the common serjeant, and the judge of the Sheriff's Court.

(*r*) 4 & 5 Will. 4, c. 36, s. 15.

8. [The Court of *General Quarter Sessions* of the peace, is a court that must be held, in every county, once in every quarter of a year (*s*):] and by statute 11 Geo. IV. & 1 Will. IV. c. 70, s. 35, the quarter sessions are appointed to be held in the first week after the 11th day of October; the first week after the 28th day of December; the first week after the 31st day of March; and the first week after the 24th day of June (*t*). This court [is held before two or more justices of the peace (*u*); one of whom must be of the *quorum* (*x*). Its jurisdiction, by statute 34 Edw. III. c. 1, extends] in general [to the trying and determining of all felonies and trespasses whatsoever,] committed within the county; [but it has never been usual to try there any greater offences than small felonies; their commission providing that if any case of

(*s*) 4 Inst. 170; 2 Hale, P. C. 42; Hawk. P. C. b. 2, c. 8. As to the origin of this court, see Harding v. Pollock, 6 Bing. 30. This court is called "the general quarter sessions of the peace," when held quarterly; when held otherwise, "the general sessions of the peace." (See R. v. Justices of Carmarthen, 4 B. & Ald. 291.) As to the general sessions of the peace in Middlesex, see 7 & 8 Vict. c. 71, ss. 2, 3; 22 & 23 Vict. c. 4, s. 4.

(*t*) By 4 & 5 Will. 4, c. 47, however, after reciting that in some counties of England and Wales the time usually fixed for holding spring assizes interferes with the due holding of the quarter sessions, in the first week after the 31st of March; and that though the justices have authority to hold general sessions of the peace at other times of the year, besides those specified in 11 Geo. 4 & 1 Will. 4, c. 70, such sessions are not *quarter sessions* within the intent of various Acts of parliament, which

give jurisdiction to the justices of the peace in their quarter sessions, or in their general quarter sessions, —it is enacted, that to prevent the interference of the spring assizes with the April quarter sessions, the justices of the Epiphany sessions may, (if they see occasion,) name two of their body to fix some day for holding the next general quarter sessions, not earlier than 7th of March, nor later than 22nd of April.

(*u*) As to justices of the peace generally, vide sup. vol. II. p. 663 et seq.

(*x*) As to the powers of the justices, to divide themselves into several courts of sessions of the peace for dispatch of business, see 7 Will. 4 & 1 Vict. c. 19, s. 4; 14 & 15 Vict. c. 55, s. 15; 21 & 22 Vict. c. 73, ss. 9—11. See also 1 & 2 Vict. c. 4, to remove doubts as to the legality of summoning juries for the trial of prisoners at *adjourned* quarter sessions.

[difficulty arises, they shall not proceed to judgment, but in the presence of one of the justices of the courts of Queen's Bench or Common Pleas, or of one of the judges of assize (a): and therefore murders, and other capital felonies, have been usually remitted for a more solemn trial at the assizes.] And now it is expressly provided, by statute, that the justices of any county shall not at any general or quarter sessions, try any prisoner for treason, murder or capital felony; nor for any felony, which when committed by a person not previously convicted of felony, is punishable with penal servitude for life (b); nor for any of the particular offences enumerated in 5 & 6 Vict. c. 38 (c). They are also so restrained from trying persons charged with fraudulent practices, as *agents*, *trustees*, *bankers* or *factors* under the Larceny Act of 1861 (d). Neither can they [try any newly-created offence, without express power given them by the statute which creates

(a) By 11 & 12 Vict. c. 78, this court may reserve any question of law for the consideration of the judges.

(b) See 4 & 5 Vict. c. 56; 5 & 6 Vict. c. 38; 20 & 21 Vict. c. 3.

(c) These are,—1. Misprision of treason. 2. Offences against the queen's title, prerogative or government, or against either house of parliament. 3. Offences subject to the penalties of *pæmunitie*. 4. Blasphemy and offences against religion. 5. Administering or taking unlawful oaths. 6. Perjury and subornation of perjury. 7. Making or suborning false oaths, &c., punishable as perjuries or misdemeanors. 8. Forgery. 9. Maliciously firing corn, grain, &c., wood, trees, &c., or heath, gorse, &c. 10. Bigamy, and offences against the laws relating to marriage. 11. Abduction of women and girls. 12. Concealing births. 13. Offences against the bankrupt laws. 14. Se-

ditionous, blasphemous, or defamatory libels. 15. Bribery. 16. Unlawful combinations and conspiracies, with certain exceptions. 17. Stealing, &c., records, &c. 18. Stealing, &c., bills, &c., and written documents relating to real estate.

Courts of general or quarter sessions are also restrained, by 9 Geo. 4, c. 69, from trying the offence of three or more persons pursuing game by night. They were also prohibited by 9 & 10 Vict. c. 25, from trying any of the offences (chiefly falling under the class of malicious injuries to property) made punishable by that Act. It is to be observed, however, that the 9 & 10 Vict. c. 25, is repealed by 24 & 25 Vict. c. 95, and that no prohibitory clause is inserted in the 24 & 25 Vict. c. 97, the Malicious Injuries to Property Act, 1861.

(d) 24 & 25 Vict. c. 96, s. 87.

[it (*e*). But there are many offences and particular matters, which by particular statutes belong properly to this jurisdiction, and ought to be prosecuted in this court,—as the smaller misdemeanors] and felonies; [and especially offences relating to the game, highways, ale houses, bastard children, the settlement and provision for the poor, servants' wages, and apprentices (*f*). Some of these are proceeded upon by indictment;] others by way of *appeal* from the orders or convictions of justices out of sessions (*g*); [and others in a summary way by motion and order thereupon;] which orders of the court of quarter sessions may for the most part, unless guarded against by particular statutes, be removed into the court of Queen's Bench [by writ of *certiorari facias* (*h*); and be there either quashed or confirmed (*i*).] But the removal of an *indictment* from the sessions, can (as we have seen) only take place under certain circumstances (*j*). [The records or rolls of the sessions, are committed to the custody of a special officer, denominated the *custos rotulorum*; who is always a justice of the quorum (*k*), and, “among them of the quorum,” saith Lambard, “a man for the most part especially picked out either for wisdom, countenance or credit (*l*).” The nomination of the *custos rotulorum* is by the royal sign manual; and to him the nomination of the *clerk of the peace* belongs (*m*),] an officer who acts as clerk

(*e*) R. v. Buggs, 4 Mod. 379; Salk. 406.

(*f*) See Lamb. Eirenarcha, and Burn's Justice.

(*g*) Vide post, p. 418, n. (*x*).

(*h*) Hawk. P. C. b. 2, c. 27, ss. 22, 23.

(*i*) See R. v. Joseph, 1 W. W. & H. 419; R. v. Joule, 5 A. & E. 539; R. v. Higgins, ibid. 554. As to the removal of the orders of quarter sessions into the Queen's Bench, to be enforced there, 12 & 13 Vict. c. 45,

s. 18. (Hawker v. Field, 1 L. M. & P. 606.)

(*j*) Vide sup. p. 387; et post, p. 470.

(*k*) As to the *quorum*, vide sup. vol. II. p. 666.

(*l*) B. 4, c. 3.

(*m*) 37 Hen. 8, c. 1; 1 W. & M. st. 1, c. 21; Harding v. Pollock, 6 Bing. 25. As to the suspension or dismissal of the clerk of the peace, see 1 W. & M. st. 1, c. 21, s. 6. He is to take the custody of such

to the court of quarter sessions, and records all their proceedings.

As regards the county of Middlesex in particular,—it has lately been enacted, by 7 & 8 Vict. c. 71, (amended by 22 & 23 Vict. c. 4,) that there shall be holden for that county two sessions, or adjourned sessions, of the peace in every calendar month; and that the first sessions in January, April, July and October, respectively, shall be the general quarter sessions of the county (*n*); and that the second sessions in January, April, July and October, shall be adjournments of the general quarter sessions. It is also provided therein, that it shall be lawful for her majesty to appoint a person,—being a serjeant, or a barrister at law of not less than ten years' standing, and in the commission of the peace for the county, and qualified by law to act as justice of the peace,—to be the Assistant Judge of the said court of sessions of the peace; who shall preside at the hearing of all appeals, on the trials of all felonies and misdemeanors, and all matters connected therewith; and who shall hold his office during good behaviour (*o*).

documents as are directed to be deposited with him under the standing orders of either house of parliament. (7 Will. 4 & 1 Vict. c. 83; see *R. v. Payn*, 6 A. & E. 392.) As to the remuneration of this officer, which used to be by fees, but may now, at the discretion of the justices, be by salary, see 14 & 15 Vict. c. 55, s. 9; and see also 18 & 19 Vict. c. 126, s. 18. As to conveyance of land, &c., to the clerk of the peace or treasurer of the county, see 21 & 22 Vict. c. 92. In boroughs having a separate court of quarter sessions, the clerk of the peace to such court is appointed by the council of the borough. (Vide sup. vol. III. p. 159.)

• (*n*) It is enacted by 22 & 23 Vict.

c. 4, s. 4, that every general sessions for Middlesex, shall have the powers, &c., of a general *quarter* sessions of that county.

(*o*) In cases of sickness or unavoidable absence, or such occasion as shall be allowed by a secretary of state, the assistant judge may appoint from time to time a deputy. (7 & 8 Vict. c. 71, s. 8.) By 14 & 15 Vict. c. 55, s. 14, the qualification for such deputy is, that he shall be of ten years' standing at the bar; but he need not be in the commission of the peace, as was required under 7 & 8 Vict. c. 71. By 22 & 23 Vict. c. 4, provisions are also made for the appointment of a temporary assistant judge in case of need.

In many corporate towns or boroughs, there is also a court of quarter sessions of the peace; having, in general, the same authority in cases arising within the limits of the borough, as the county quarter sessions within the county (*p*). But of such court, the recorder of the borough is, by 5 & 6 Will. IV. c. 73, s. 105, to be the sole judge: and he is thereby directed to hold such court once in every quarter of a year; or at such other and more frequent times as in his discretion he may think fit, or her majesty may direct.

9. [The *Sheriff's Tourn* (*q*), or *rotation*, is a court of record,] appointed to be [held twice every year, within a month after Easter and Michaelmas, before the sheriff in different parts of the county: being indeed only the *turn* of the sheriff to keep a court leet, in each respective hundred (*r*). This therefore is the great court leet of the county, as the county court is the court baron: for out of this, for the ease of the sheriff, was taken,—

10. The *Court Leet*, or *View of Frank Pledge* (*s*); which is a court of record,] appointed to be [held once in the year and not oftener, within a particular hundred, lordship, or manor, before the steward of the leet (*t*): being the king's court granted by charter to the lords of those hundreds or manors. Its original intent was to view the frank pledges, that is, the freemen within the liberty: who, we may remember, according to the institution of the great Alfred, were all mutually pledges for the good behaviour of each other (*u*). Besides this, the preserva-

(*p*) 5 & 6 Will. 4, c. 76, ss. 103, 105, 118. As to recorders, and courts of quarter sessions of the peace for boroughs, vide sup. vol. III. p. 159. It is to be observed, that all the restrictions expressed by statute, with regard to the trial of certain offences at general or quarter sessions, mentioned sup. p. 398, in reference to the quarter sessions for

the county, equally apply to these borough sessions.

(*q*) 4 Inst. 259; 2 Hale, P. C. 69; Hawk. P. C. b. 2, c. 10.

(*r*) Mirr. c. 1, ss. 13, 16.

(*s*) 4 Inst. 261; Hawk. P. C. b. 2, c. 11.

(*t*) Mirr. c. 1, s. 10.

(*u*) Vide sup. vol. I. p. 129.

[tion of the peace, and the chastisement of divers minute offences against the public good, are the objects both of the court leet, and of the sheriff's tourn: which have exactly the same jurisdiction, one being only a larger species of the other: extending over more territory, but not over more causes. All freeholders within the precinct are obliged to attend them, and all persons commorant therein: which commorancy consists in usually lying there: a regulation which owes its original to the laws of king Canute (z). But persons under twelve, and above sixty years old; peers; clergymen; women; and the king's tenants in antient demesne,—are excused from attendance there: all others being bound to appear upon the jury, (if required,) and make their due presentments. It was also antiently the custom to summon all the king's subjects, as they respectively grew to years of discretion and strength, to come to the court leet, and there take the oath of allegiance to the king. The other general business of the leet and tourn, was to present by jury all crimes whatsoever that happened within their jurisdiction: and not only to present, but also to punish, all trivial misdemeanors; as all trivial debts were recoverable in the court baron and county court: justice, in these minuter matters of both kinds, being brought home to the doors of every man by our antient constitution. Thus in the Gothic constitution, the *hæreda*, which answered to our court leet, "*de omnibus quidem cognoscit, non tamen de omnibus judicat* (a)." The objects of their jurisdiction, are therefore unavoidably very numerous; being such as, in some degree, either less or more, affect the public weal, or good government of the district in which they arise; from common nuisances and other material offences against the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet have been for a long time in a de-

(z) Part 2, c. 19.

(a) *Suicr. de Jure Goth.* l. 1, c. 2.

[clining way (*b*).] And they have both now fallen, in most parts of the kingdom, into total disuetude: [a circumstance owing, in part, to the discharge granted by the statute of Marlbridge, (32 Hen. III. c. 10,) to all prelates, peers, and clergymen, from their attendance upon these courts; which occasioned them to grow into disrepute. And hence it is, that their business hath, for the most part, gradually devolved upon the quarter sessions; which it is particularly directed to do in some cases by stat. 1 Edw. IV. c. 2. It has also, in some instances, devolved upon the justices out of sessions.

11. The Court of the *Coroner* is also a court of record, to inquire, when any one dies in prison, or comes to violent or sudden death, by what manner he came to his end (*c*). And this he is only entitled,] in general, [to do *super visum corporis*. Of the coroner and his office, we treated at large in a former volume, among the public officers of the kingdom, and therefore shall not here repeat our inquiries; only mentioning his court, by way of regularity, among the criminal courts of the nation (*d*).

12. The Court of the *Clerk of the Market*, is incident to every fair and market in the kingdom, to punish misdemeanors therein (*e*); as a court of *pie'd poudre* is to determine all disputes therein, relating to private or civil property (*f*). The object of this jurisdiction, is principally the recognizance of weights and measures (*g*); to try whether they be according to the true standard thereof or no. Which standard was antiently committed to the custody of the *bishop*, who appointed some clerk under him to inspect the abuse of them more narrowly: and hence this officer, though usually a layman, is called the *clerk* of the

(*b*) See Colebrook Elliott, 3 Burr. 1864.

(*c*) 4 Inst. 271; 2 Hale, P. C. 53; Hawk. P. C. b. 2, c. 9.

(*d*) Vide sup. vol. II. p. 655 et seq.

(*e*) 4 Inst. 273.

(*f*) Vide sup. vol. III. p. 470,

n. (*s*).

(*g*) See stat. 17 Car. 2, c. 19. As to weights and measures, vide sup. vol. II. p. 537.

[market(*h*). If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burnt. This is the most inferior court of criminal jurisdiction in the kingdom:] and its functions, as regards weights and measures, seem in a great measure to be now superseded by the provisions of 5 & 6 Will. IV. c. 63; which enact, that inspectors or examiners of weights and measures shall be appointed, who shall attend with the stamps and copies of the imperial standard weights in their custody, at each of the several market towns; and examine and stamp, (if found correct,) such weights and measures as shall be brought to them for that purpose; and give, if required, a certificate of such stamping. And that it shall be lawful for any magistrate, or authorized inspector, to enter at all reasonable times any shop or other place, where goods are exposed for sale, in order to examine the weights and measures; and that, if found incorrect, such weights and measures shall be liable to be seized and forfeited; and that the person in whose possession the same shall be found, or who shall obstruct such examination, shall be liable to a penalty of 5*l.* (*i*)

Secondly. As to the criminal courts of a *private or special jurisdiction*.

[There are a few other criminal courts, of greater dignity than many of] those already noticed; [but of a more confined and partial jurisdiction (*j*): extending only to some particular places, which the royal favour, confirmed by Act of Parliament, has distinguished by the privilege of having peculiar courts of their own, for the punishment of crimes and misdemeanors arising within the bounds of their cognizance. These, not being universally dispersed,

(*h*) Bac. of English Government, Mee. & W. 747.
b. 10, c. 8.

(*j*) Vide sup. p. 378.

(*i*) See *Hutchins v. Reeves*, 9

[or of general use, as the former, but confined to one spot, as well as to a determinate species of causes,—may be denominated private or special courts of criminal jurisdiction.] Thus—

1. [The Court of the *Lord Steward* of the king's *Household*, or, in his absence, of the treasurer, comptroller, and steward of the *marshalsea* (*k*), was created by statute 33 Hen. VIII. c. 12, with a jurisdiction to inquire of, hear, and determine all treasons, misprisions of treason, murders, manslaughter, bloodshed, and other malicious strikings, whereby blood shall be shed in or within the limits (that is, within two hundred feet of the gate) of any of the palaces or houses of the king, or any other house where the royal person shall abide. The proceedings are also by jury, both a grand and petit one, as at common law; taken out of the officers and sworn servants of the king's household. The form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand,—which is part of the punishment for shedding blood in the king's court,—are very minutely set forth in the said statute 33 Hen. VIII., and the several offices of the servants of the household in and about such execution are described: from the serjeant of the wood-yard, who furnishes the chopping block, to the serjeant farrier, who brings hot irons to sear the stump.] But so much of this Act "as relates to the punishment of "manslaughter and malicious striking, by reason whereof "blood shall be shed," was repealed by 9 Geo. IV. c. 31; and the jurisdiction of the court itself has long since fallen into disuse.

2. [As in the preceding Book, we mentioned the courts of the two universities for the redress of civil in-

(*k*) There was also formerly the court of the *lord steward, treasurer, or comptroller* of the king's household; which was instituted by 3 Hen. 7, c. 14, to inquire of felony by any of the king's sworn servants in the cheque roll of the household,

under the degree of a lord, by the inquisition of a jury of twelve "sad men," that is, sober and discreet persons. This court is abolished; the statute of 3 Hen. 7, c. 14, being repealed by 9 Geo. 4, c. 31.

[juries (*l*),—it will be proper to add a short word concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court of Oxford hath authority to determine all criminal offences or misdemeanors,] committed by a member of the university, [under the degree of treason, felony, and mayhem;] and treason, felony, and mayhem, committed by any member, may also be tried in the Court of the *Lord High Steward* of the university (*m*).

[For by the charter of the 7th June, in the second year of Henry the fourth, (confirmed, among the rest, by the statute 13 Eliz. c. 29,) consuance is granted to the university of Oxford of all indictments of treasons, insurrections, felonies, and mayhem, which shall be found in any of the royal courts against a scholar or privileged person; and they are to be tried before the high steward of the university, or his deputy; who is to be nominated by the chancellor of the university for the time being. But, when his office is called forth into action, such high steward must be approved by the lord high chancellor of England; and a special commission, under the Great Seal, is given to him and others, to try the indictment then depending, according to the law of the land, and the privileges of the said university. When, therefore, any indictment is found at the assizes or elsewhere, against any scholar of the university or other privileged person, the vice-chancellor may claim the consuance of it (*n*): and, (when claimed in due

(*l*) Vide sup. vol. III. p. 469.

(*m*) Blackstone treats only of the criminal jurisdiction of the University of Oxford. A similar jurisdiction is, however, enjoyed by that of Cambridge. (Bac. Ab. tit. "Universities.") As to the jurisdiction exercised by the proctors over persons *not* members of the university, in order to protect the morals of the students, see *Kemp v. Neville*, 7 Jur. (N. S.) 914.

(*n*) See *R. v. Agar*, 5 Burr. 2820;

Kendrick v. Kynaston, 1 Bla. Rep. 454; *Hayes v. Long*, 2 Wils. 310; *Leasingby v. Smith*, ibid. 406; *R. v. Routledge*, 2 Doug. 531; *R. v. Grundon*, Cowp. 319; *Thornton v. Ford*, 15 Mosh. 634. The statute 19 & 20 Vict. c. xvii., s. 18, takes away all right of the University of Cambridge to claim consuance in any proceedings (criminal or otherwise) to which any person, *not* a member of the university, is party.

[time and manner,) it ought to be allowed him by the judges of assize; and then it comes to be tried in the high steward's court. But the indictment must first be found by a grand jury, and then the conusance claimed; for it is apprehended that the high steward cannot proceed originally *ad inquirendum*: but only, after inquest in the common law courts, *ad audiendum et determinandum*. Much in the same way, as when a peer is to be tried in the court of the lord high steward of Great Britain, the indictment must first be found at the assizes or in the Court of Queen's Bench; and then, in consequence of a writ of *certiorari*, transmitted to be finally heard and determined, before his grace the lord high steward and the peers.

When the conusance is so allowed,—if the offence be *inter minora crimina*, or a misdemeanor only,—it is tried in the chancellor's court, by the ordinary judge. But if it be for treason, felony, or mayhem, it is then, and then only, to be determined before the high steward, under the king's special commission to try the same. The process of the trial is this: The high steward issues one precept to the sheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the bedells of the university, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio universitatis gaudentes*." And by a jury formed *de medietate*,—half of freeholders and half of matriculated persons,—is the indictment to be tried: and that in the Guildhall of the city of Oxford. And if execution be necessary to be awarded, in consequence of finding the party guilty] of a capital offence, [the sheriff of the county must execute the university process: to which he is annually bound by an oath.]

These proceedings have been described with some minuteness, on account of the importance of the privilege; but in modern times the occasions for reducing them into practice have been happily very rare; [nor will it perhaps ever be thought advisable to revive them, though it is not a right that rests merely *in scriptis*, or theory, but has

[formerly been carried into execution. There are many instances,—one in the reign of Queen Elizabeth, two in that of James the first, and two in that of Charles the first,—where indictments for murder have been challenged by the vice-chancellor at the assizes, and afterwards tried before the high steward, by jury. The commissions under the Great Seal, the sheriff's and bedells' panels, and all the other proceedings on the trial of the several indictments,—are still extant in the archives of the university.]

CHAPTER XV.

OF SUMMARY CONVICTIONS.



[We are next, according to the plan laid down (*a*), to take into consideration the proceedings in the courts of criminal jurisdiction, in order to the punishment of offences.] These also, as well as the offences themselves, have become, in a great variety of instances, the subject of legislative provisions; so that our disquisitions in this latter portion of the work, as well as in the former, will be founded partly on the principles of the common law, and partly on parliamentary enactment. [These proceedings are divisible into two kinds, *summary* and *regular*: the former of which shall be briefly explained, before we enter on the latter, which will require a more thorough and particular examination.

. By a *summary* proceeding, is meant principally such as is directed by several Acts of Parliament, (for the common law is a stranger to it, unless in the case of contempts,) for the conviction of offenders, and the infliction of certain penalties created by those Acts. In these, there is no intervention of a jury; but the party accused is acquitted or condemned, by the suffrage of such person only as the statute has appointed for his judge: an institution designed professedly for the greater ease of the subject; by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offence.]

(*a*). Vide sup. p. 378.

I. [Of this summary nature are all trials of offences and frauds contrary to the laws of the *excise*(*b*): which are to be inquired into and determined either by the *commissioners of excise*, or by *justices of the peace*(*c*); officers who are all of them appointed, and removable, at the discretion of the Crown.]

II. Another branch of summary proceedings, is that before justices of the peace in respect of a variety of minor offences: viz. such as are prohibited only under pecuniary penalties(*d*). Some of these were formerly punishable at the court leet, while that court was in use; but the greater part have been both created, and placed under the summary jurisdiction of one or more of the justices of the peace, by the provisions of modern Acts of Parliament. But besides these, there are others of a graver description, which may also now be summarily dealt with in the same manner, and for which the punishment is in some cases a pecuniary penalty, and in others either a penalty or imprisonment with hard labour for a term of six months; or, in case of a second conviction, twelve months. Of these offences, our limits will only permit the mention of some of the most important, such as the *abetment* of any offence punishable by way of summary conviction under the 24 & 25 Vict. cc. 96, 97(*e*),—the stealing, or killing with intent to steal, any *bird*, *beast* or other domestic or confined animal not the subject of larceny at the common aw(*f*),—killing or wounding forest *deer*(*g*),—killing *dogs* or other animals (not being cattle) either the subject of larceny at common law or ordinarily

(*b*) As to the *excise*, vide sup. vol. 11. p. 587 et seq. The mode of proceeding for offences against the *customs*, (some of which also are punishable before justices,) is pointed out by 16 & 17 Vict. c. 107, s. 269, et seq. (Et vide sup. pp. 341, 342.)

(*c*) See 4 & 5 Vict. c. 20, s. 26, et seq.; 15 & 16 Vict. c. 61. As to

the justices of the peace, vide sup. vol. 11. p. 663 et seq.

(*d*) Vide sup. p. 91.

(*e*) See 24 & 25 Vict. c. 96, s. 99; c. 97, s. 63.

(*f*) 24 & 25 Vict. c. 96, ss. 21, 22.

(*g*) Ib. c. 96, s. 12.

(*h*) Ib. c. 97, s. 41.

kept confined (*h*),—stealing (or having in possession stolen) *dogs* (*i*),—stealing *fences* (*k*),—taking *fish* (*l*),—killing *hares* or *rabbits* (*m*),—doing certain *malicious injuries* to property (*n*),—*receiving* certain kinds of property knowing it to have been stolen (*o*),—injuring, &c., electric or magnetic *telegraphs* (*p*),—and injuring or stealing *trees* (*q*) or *vegetable productions* in gardens (*r*). As to *assaults* or *batteries*, also, the legislature has recently made fresh provisions with regard to the summary jurisdiction of justices. And now, by 24 & 25 Vict. c. 100, s. 42 (*s*), when any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint of the party aggrieved, may hear and determine the offence: and may commit the offender to prison, with or without hard labour for any period not exceeding two months; or else fine him to the extent of £5, and, in default of payment, imprison him to the extent above mentioned. And (by sect. 43) if the assault or battery be on a male child, whose age, in the opinion of the justices, shall not exceed fourteen years, or be upon any female, the punishment inflicted may be by imprisonment, with or without hard labour, for as long as six months, or by a fine to the extent of 20*l.*, (or in default, imprisonment); and the offender may also be bound over to keep the peace for an additional six months. And the justices are required, in such charges, if on the hearing upon the merits they deem the assault or battery not proved, or justifiable, or too trifling to merit punishment, to give the party charged, in dismissing the complaint, a certificate of dismissal, which will operate as a bar to any further proceedings (*t*). While,

(*i*) 24 & 25 Vict. c. 96, ss. 18, 19.

(*k*) *Ib.* s. 49.

(*l*) *Ib.* s. 24.

(*m*) *Ib.* c. 96, s. 17.

(*n*) *Ib.* c. 97, s. 52.

(*o*) *Ib.* c. 96, s. 97.

(*p*) *Ib.* c. 97, ss. 37, 38.

(*q*) *Ib.* c. 96, s. 33.

(*r*) *Ib.* c. 96, ss. 36, 37.

(*s*) Re-enacting 9 Geo. 4, c. 31, s. 27, repealed by 24 & 25 Vict. c. 95.

(*t*) 24 & 25 Vict. c. 100, ss. 44, 45. As to such a certificate and its effects on subsequent proceedings, see *Tunncliffe v. Tedd*, 5 C. B. 553; *Chaddock v. Wilbraham*, *ibid.* 642. It may be noticed that no such

on the other hand, if they shall find that the assault or battery was accompanied by an attempt *to commit any felony*, or are of opinion that the same is, for any other circumstance, a fit subject for an indictment, they are to deal with the case as if they had no authority to determine the same. And there is also a proviso preventing the justices from determining any case in which a question shall arise as to the title to lands, tenements or hereditaments, or any interest therein or accruing therefrom; or as to any bankruptcy, or any execution under the process of any court of justice(*u*).

Moreover, the jurisdiction now conferred upon justices enables them, in certain cases, to dispose, summarily, of the *felonious* offence of larceny. For, first, with respect to *juvenile offenders*, it is provided by 10 & 11 Vict. c. 82 (*x*), and 13 & 14 Vict. c. 37, that any person, apparently not more than *sixteen* years of age, who is charged with having committed, or attempted to commit, (or with having been an aider, abettor, counsellor, or procurer, in the commission of,) any offence, then or thereafter to be by law deemed, or declared to be, simple larceny, or punishable as simple larceny,—may, on conviction before two justices in open court at petty sessions(*y*), be imprisoned by them for three months, with or without hard labour; to which whipping may be added, if the offender be a male and not exceeding the age of *fourteen* years(*z*). And the Acts

further proceedings can be had, in the case of the offender having been convicted, and having either paid the fine or suffered the imprisonment awarded. (24 & 25 Vict. c. 100, s. 45.)

(*u*) 24 & 25 Vict. c. 100, s. 46.

(*x*) The returns required by this Act to be made to a secretary of state, are abolished by 21 & 22 Vict. c. 67.

(*y*) By 10 & 11 Vict. c. 82, s. 2, any metropolitan or other stipen-

diary police magistrate, has the same jurisdiction as these Acts confer on two or more justices at petty sessions.

(*z*) See 13 & 14 Vict. c. 37, s. 1. By 25 & 26 Vict. c. 18, in awarding the punishment of whipping, the justices must specify the number of strokes (which must not exceed twelve), and the instrument (*viz.* a birch rod) to be used in inflicting them.

provide that if such justices, on the hearing of the case, shall deem the offence not to be proved, or that it is not expedient to inflict any punishment, they shall dismiss the party charged, (with or without requiring sureties for his future good behaviour,) and shall furnish him with a certificate stating such dismissal: and that, on obtaining such certificate, or on having been summarily convicted under the Acts, he shall be discharged from all further or other proceedings for the same cause. While, on the other hand, if the justices shall be of opinion that the charge is, from any circumstance, a fit subject for prosecution by indictment,—or if either the person charged, or his parents, shall *object*, when interrogated on the subject, to the case being summarily disposed of under the provisions of the Acts,—then that the justices shall proceed with the charge as in other cases of felony. Secondly, by 18 & 19 Vict. c. 126, the summary jurisdiction given by the above Acts is extended, and is made no longer to apply exclusively to the case of *juvenile* offenders. For it is by this last Act enacted that where *any* person is charged at petty sessions(*a*) with simple larceny (the value of the property stolen, in the opinion of the justices, not exceeding five shillings), or is charged with having *attempted* to commit either larceny from the person or simple larceny;—the justices may proceed to hear and determine the charge in a summary way. And, (if the person charged shall confess the same, or the justices after hearing the whole case for the prosecution and for the defence shall find the charge to be proved,) the justices may convict such person and commit him to prison, with or without hard labour, for any period not exceeding three calendar months: or, (if they find the charge not proved,) shall dismiss the charge and deliver to the person so tried, a certificate of dismissal. There is, however, a proviso, that if the person charged do not *consent* to have the case so heard and determined; or if

(a) See 19 & 20 Vict. c. 118, providing for the operation of this Act

in places not being within a petty sessional division.

it shall appear that the offence is one which, owing to the previous conviction of the party charged, is punishable with penal servitude (*b*); or if it shall appear that the charge, from any other circumstances, should be proceeded on by way of indictment, rather than to be disposed of summarily;—the justices shall deal with the case, as if the Act had not passed. They are also authorized to dismiss the persons charged without proceeding to a conviction,—if, on the hearing, there appear to be circumstances in the case which render it inexpedient to inflict any punishment.

Moreover the same Act contains a further provision that where any person is charged at petty sessions with simple larceny, (the property alleged to have been stolen exceeding in value five shillings;) or with stealing from the person, or with larceny as a clerk or servant; and the evidence adduced by the prosecutor appears sufficient to put the person charged on his trial, and the case to be one which may properly be disposed of in a summary way and adequately punished under this Act,—such person may be asked, (after the charge has been reduced to writing,) whether he is guilty or not thereof: and if he shall say that he is guilty, the justices may enter such plea on the proceedings; and may thereupon commit the offender to prison, with or without hard labour, for any term not exceeding six calendar months (*c*).

The course of proceeding upon summary convictions in general, has been recently regulated by the statute 11 & 12 Vict. c. 43 (*d*); which consolidates and amends the pre-

(*b*) Vide *sup.* p. 204, as to the case of larceny after a previous conviction for felony.

(*c*) 18 & 19 Vict. c. 126, s. 3. A single police magistrate within the metropolitan district (or any stipendiary magistrate within the place for which he is appointed) has all the jurisdiction given by this Act to

the justices in petty sessions. (Sect. 16.)

(*d*) The statute 11 & 12 Vict. c. 43, does not affect any of the provisions in the Metropolitan Police Acts,—viz. 10 Geo. 4, c. 44; 2 & 3 Vict. cc. 47, 71; 3 & 4 Vict. c. 84; 19 & 20 Vict. c. 2; 20 & 21 Vict. c. 64; 23 & 34 Vict. c. 135,

vious provisions on the subject(e). It may be shortly stated as follows:—

Where a written *information* has been laid before any justice of the peace for any county or place in England or Wales, of any offence committed within his jurisdiction, and punishable on summary conviction before one or more justices; or where any *complaint*, whether written or verbal, has been made before any justice of the peace of any county or place in England or Wales, in or within his jurisdiction, on which one or more justices have authority by law to make an order for the payment of money or otherwise;—such justice is to issue his *summons* to the party charged, requiring him to appear and answer(f): and, if the summons be disobeyed, may issue a *warrant* to apprehend him, and bring him before the court: or, if the justice think fit, he may,—in the case of an information, and provided it be supported by the oath of the prosecutor(g),—cause a warrant instead of a summons to be issued in the first instance(h). By the general rule, however, and subject to exception in any particular case where

and 24 & 25 Vict. c. 51; nor in the London Police Act, 2 & 3 Vict. c. xciv. (and see 18 & 19 Vict. c. 120, s. 227). Nor does the 11 & 12 Vict. c. 43, extend to proceedings under the excise or customs, &c., or as to paupers or lunatics, or under the Factory Acts. (Sect. 33.)

(e) In the time of Blackstone, the course of proceeding before magistrates had begun to take a regular shape, but seems to have been attended at a prior period with little ceremony. For he says, (vol. iv. p. 283,) “The summons is now held to be an indispensable requisite, though the justices long struggled the point, forgetting that rule of natural reason expressed by Seneca.

‘*Qui statuit aliquid, parte inaudita altera,*
Æquum licet statuerit, haud æquus fuit.’ ”

(f) 11 & 12 Vict. c. 43, s. 1, and see sect. 29. The form of the summons and of the other instruments under this Act, is given in a schedule thereto.

(g) In proceedings before magistrates, (as well as in other cases,) an affirmation, in lieu of oath, will suffice in the case of Quakers, Moravians or Separatists; (vide sup. vol. II. p. 353;) and (with respect to the witnesses) will also suffice in the case of any persons unwilling to be sworn from conscientious scruples (vide sup. vol. III. p. 635, n.).

(h) 11 & 12 Vict. c. 43, ss. 2, 3, &c.

a different limitation as to time is provided by Act of Parliament, every such information or complaint must be laid or made within six calendar months from the time when the matter arose (*k*).

A summons may also be issued by the justice to compel the attendance of witnesses for the prosecutor, complainant, or defendant, as the case may be; and if the summons be disobeyed, the justice may issue his warrant for the same purpose; or, if satisfied by evidence upon oath that the witness will not attend, may issue the warrant in the first instance (*l*).

The hearing is to take place before one justice, or two or more, as may be directed in the Act of Parliament relating to the particular offence; or, where there is no direction, then before any one justice of the county or place where the matter has arisen; and the room where it takes place to be deemed an open and public court, to which all are to have access; and the prosecutor or complainant is to be allowed to conduct his case, and to examine and cross-examine the witnesses, by his counsel or attorney; and the like privilege is allowed to the defendant (*m*).

The hearing commences by stating to the defendant the substance of the information or complaint; and he may show cause, if he can, why he should not be convicted or an order made (*n*); but if he do not admit the truth of what is charged, the court is to proceed to hear the prosecutor or complainant, or his witnesses; and afterwards the defendant and his witnesses; and also to hear such witnesses as the prosecutor or complainant may examine in reply, if the defendant shall have given any evidence except as to his general character: but the former shall not

(*k*) 11 & 12 Vict. c. 43, s. 11.

(*l*) Sect. 7.

(*m*) Sect. 12. See 18 & 19 Vict. c. 126, s. 4.

(*n*) By 11 & 12 Vict. c. 43, s. 9, a variance between the information

and the evidence adduced in support thereof, when not such as to have misled the party charged, is in general immaterial; when otherwise, it will be ground for an adjournment.

be entitled to make any observations upon the evidence given by the latter, nor the latter to make any observations upon the evidence given by the former in reply. And when the evidence, (all which is to be upon oath,) shall be closed, the court shall proceed to convict, or make an order on, the defendant, or else dismiss the information or complaint, as the case may require;—every conviction or order being drawn up in proper form, and lodged with the clerk of the peace, to be filed among the records of the quarter sessions (*o*); and a certificate of every order of dismissal, being also drawn up and given to the defendant (*p*).

It is also competent to the court, in any case, to award costs, either against the defendant or the prosecutor or complainant, as the case may be. And for the amount of such costs, or of any pecuniary penalty or sum of money adjudged by a conviction or order, the court may issue a warrant of distress on the goods and chattels of the party: or, in default of distress (*q*), or where the statute simply directs imprisonment, may issue a warrant of commitment to prison (*r*). But if satisfied that a warrant of distress would be ruinous to the defendant,—or that he has no goods,—the court is authorized to issue a warrant of commitment in any case, in lieu of a warrant of distress (*s*).

Power is also granted to the court, from time to time, to adjourn the proceedings as circumstances may require; and in the mean time to allow the defendant to go at large; or commit him to prison. Or, it may discharge him on entering into a recognizance, (either with or without sureties,) conditioned for his re-appearance at the adjournment day; which recognizance, if broken, is to be transmitted to the clerk of the peace to be proceeded upon (*t*).

(*o*) See 18 & 19 Vict. c. 126, s. 7.

(*p*) 11 & 12 Vict. c. 43, s. 14. See 18 & 19 Vict. c. 126, ss. 1, 7.

(*q*) 11 & 12 Vict. c. 43, ss. 18, 22. (As to sect. 22, see 21 & 22

Vict. c. 73, s. 5.)

(*r*) 11 & 12 Vict. c. 43, ss. 20, 24.

(*s*) Sect. 19.

(*t*) Sects. 16, 29.

This is, in general, the method of summary proceedings before a justice or justices of the peace; though the particular statute which creates the offence, and authorizes its punishment, sometimes also specially points out the method in which offenders are to be convicted (*u*). It is to be remarked, however, that unless there be some enactment directing a prosecution before a justice or justices of the peace, no offence is capable of being so dealt with; but the offender must be proceeded against either by indictment or information. It also deserves notice, that a summary conviction is not generally speaking conclusive; but is subject to *appeal*. For in the greater number of the statutes which authorize this course of proceeding in particular instances, an appeal to the quarter sessions is also authorized (*x*). And in such cases, and if a question of *law* be involved, the decision of the quarter sessions may, in its turn, be brought under the review of the Court of Queen's Bench (*y*). Moreover, by 20 & 21 Vict. c. 43, it is now provided, with respect to any information or complaint summarily determined before a justice or justices, that any point of law arising thereon may be brought immediately before any of the superior courts of law at Westminster, in the form of a case for the opinion of such court,—the appellant first entering into a recognizance to submit himself to the original determination, unless it be reversed. And it is provided, that, any person, who shall

(*u*) See 5 & 6 Will. 4, c. 76, s. 127.

(*x*) The course of procedure in appeals to the sessions, is mainly regulated by 12 & 13 Vict. c. 45; which also, in most cases, enables the parties, (after notice of appeal given,) by consent, and leave of a judge of any one of the superior courts of law at Westminster, to take the opinion of such court on the facts stated in a *special case*, instead of prosecuting the appeal at the sessions. It may be also

observed, that there is no appeal from the decision of justices as to an *assault* (as to which jurisdiction, vide sup. p. 411). Nor in cases disposed of by them under the Juvenile Offenders' Acts (vide sup. p. 412). Nor under the 18 & 19 Vict. c. 126 (vide sup. p. 413).

(*y*) The mode of proceeding in such cases is, in general, by *mandamus*, requiring the quarter sessions to *re-hear* the appeal. (See Dickinson, Q. S., 6th ed. p. 658.)

appeal under these provisions, shall be taken to have abandoned any appeal to the quarter sessions, to which he would otherwise be entitled by law (z).

III. [To this head of summary proceedings may also be properly referred the method immemorially used by the superior courts of justice, of punishing contempts by *attachment*, and the subsequent proceedings thereupon.

The contempts which are thus punished, are either *direct*; which openly insult or resist the powers of the courts, or the persons of the judges, who preside there. Or else, are *consequential*; which, (without such gross insolence, or direct opposition,) plainly tend to create an universal disregard of their authority. The principal instances of either sort that have been usually punished by attachment, are of the following kinds(a). 1. Those committed by inferior judges and magistrates: by acting unjustly, oppressively, or irregularly, in administering those portions of justice which are intrusted to their distribution; or by disobeying the royal writs issued out of the superior courts, by proceeding in a cause after it is put a stop to, or removed, by writ of prohibition, certiorari, error, supersedeas, and the like. For as the superior courts, (and especially the Court of Queen's Bench,) have a general superintendence over all inferior jurisdictions,—any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority, whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court: by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty. 3. Those committed by attornies and solicitors, (who are also officers of the respective courts,) by gross instances of fraud and corruption, injus-

(z) 20 & 21 Vict. c. 43, s. 14.
As to the practice on such appeals,
see Reg. Gen. M. T. 1857; 18 C. B.
5, 6; and 3 C. B. (N. S.) 141. And

as to the cases in which it lies, see
Davys, app. Douglas, resp. 4 H. & N.
180.

(a) Hawk. P. C. b. 2, c. 22.

[tice to their clients, or other dishonest practices. For the malpractice of the officers reflects some dishonour on their employers; and, if frequent or unpunished, creates among the people a disgust against the courts themselves. 4. Those committed by jurymen in collateral matters relating to the discharge of their office: such as making default when summoned; refusing to be sworn, or to give any verdict; eating or drinking without the leave of the court, and especially at the cost of either party; and other misbehaviour or irregularities of a similar kind;—but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict (c). 5. Those committed by witnesses: by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by parties to any suit or proceeding before the court: by disobedience to any rule or order made in the progress of a cause; as by non-payment of costs awarded by the court upon a motion; or by non-observance of an award duly made] a rule of the court (d). However, the contempt in such cases as last mentioned, is in general consequential or constructive only; as it implies no actual disregard of authority, but may proceed from the poverty of the party. 7. Those committed by *any* persons: in the way of disobedience to the queen's writs, or other disrespect to the court's authority. [Some of these contempts may arise in the face of the court: as by rude and contumelious behaviour; by obstinacy, perverseness or prevarication; by breach of the peace, or any wilful disturbance whatever. Others in the absence of the party: as by disobeying or treating with disrespect the sovereign's writ, or the rules or process of the court; by perverting such writ or process to the purpose of private malice, extortion, or injustice; by

(c) Vide sup. vol. III. p. 659, n. (c).

(d) Vide sup. vol. III. p. 372. Against persons having *privilege of parliament*, obedience to a rule of

court may also be enforced by the party entitled to the benefit of the rule, by *distress infinita* (10 Geo. 3, c. 50, s. 5).

[speaking or writing contemptuously of the court, or judges acting in their judicial capacity; by printing false accounts, or even true ones,] if against the prohibition of the court, [of causes then depending in judgment(*e*); and by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority, (so necessary for the good order of the kingdom,) is entirely lost among the people.

The process of attachments for these and the like contempts, must necessarily be as antient as the laws themselves. For laws without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised, as early as the annals of our law extend. And though a very learned author seems inclinable to derive this process from the Statute of Westminster the second, 13 Edward I. c. 39, —which ordains that in case the process of the king's courts be *resisted* by the power of any great man, the sheriff shall chastise the resisters by imprisonment, "*a quâ non deliverentur sine speciali præcepto domini regis*;" and that if the sheriff himself be resisted, he shall certify to the courts the names of the principal offenders, their aiders, consentors, commanders and favourers, and that by a special writ judicial they shall be *attached* by their bodies to appear before the court; and that if they be convicted thereof they shall be punished at the king's pleasure, without any interfering by any other person whatsoever:—yet he afterwards more justly concludes, that it is a part of the *law of the land*, and as such is *confirmed* by the statute of *Magna Charta* (*f*).

(*e*) See *R. v. Clement*, 4 B. & Ald.
218.

(*f*) *Gilb. Hist. C. P.* ch. 3.

[If the contempt be committed in the face of the court, the offender may be instantly apprehended, and imprisoned at the discretion of the judges, without any further proof or examination (*h*). But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges, upon *affidavit*, see sufficient ground to suspect that a contempt has been committed, that is, an actual contempt,—for upon a merely constructive one, for non-payment of money or the like, the party is attached at once, and sent to prison for satisfaction of the demand, as in any other case of civil debt—they either make a rule on the suspected party to show cause why an attachment should not issue against him (*i*); or, in very flagrant instances of contempt, the attachment issues in the first instance (*k*). This process of attachment is merely intended to bring the party into court; and when there, he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt (*l*). These interrogatories are in the nature of a charge or accusation; and must, by the course of the court, be exhibited within the first four days (*m*); and if any of the interrogatories be improper, the defendant may refuse to answer it, and move the court to have it struck out (*n*). If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury (*o*). If he confesses the contempt, the court will proceed to correct him,] usually by fine or by imprisonment, or by both (*p*).

(*h*) Standf. P. C. 73.

(*i*) Styl. 277. As to the cases in which the rule will be absolute in the first instance, see Reg. Gen. Hil. T. 1853, (Pr.) r. 168.

(*) Anony., Salk. 84; R. v. Jones, Stra. 185; R. v. Cambridge, ib. 564.

(*l*) See The Queen v. Hemsworth,

3 C. B. 749.

(*m*) Saunders v. Melhuish, 6 Mod. 73.

(*n*) R. v. Barber, Stra. 444.

(*o*) Saunders v. Melhuish, ubi sup.

(*p*) See The Queen v. Hemsworth, ubi sup. p. 749. A peer or lord of parliament is not exempted

[If the contempt be of such a nature, that, when the fact is once acknowledged, the court can receive no further information by interrogatories than it is already possessed of,—as in the case of a *rescous* (*q*),—the defendant may be admitted to make such simple acknowledgment, and receive his judgment, without answering to any interrogatories; but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.]

It cannot have escaped the attention of the reader, that this method of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance; and seems indeed to have been derived] to the superior courts of the common law, [through the medium of the courts of equity. For the whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was originally in the nature of a process of contempt;] acting, primarily, *in personam* and not *in rem* (*r*).] It deserves notice, however, that in equity, after the party has answered the interrogatories, his answer may be contradicted and disproved by his adversary; [whereas in the courts of law, the admission of the party to purge himself on oath is more favourable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed.] Whatever may be the origin, however, of this anomalous method of examining the delinquent himself upon oath, with regard to the contempt alleged, it is of high antiquity (*s*); as much so indeed as the process by attachment itself; [and by long and immemorial usage, it is now become the law of the land.]

from process of attachment; at least if the contempt be gross—as by refusing to pay obedience to a writ of *habeas corpus* directed. (*R. v. Earl Ferrers*, 1 Burr. 631; *Lords' Journal*,

7th Feb., 8th June, 1757.)

(*q*) *R. v. Elkins*, 4 Burr. 2129.

(*r*) *Vide sup.* pp. 52, 60.

(*s*) *M. 5 Edw. 4, rot. 75*, cited in *Rast. Ent.* 268, pl. 5.

CHAPTER XVI.

OF ARRESTS FOR FELONY OR MISDEMEANOR.

[WE are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction ;] viz. that which is (as the general rule) pursued where the offence charged amounts to a felony or indictable misdemeanor(*a*). This subject may be distributed under eleven general heads, following each other in progressive order, viz.

1. Arrest. 2. Commitment and bail. 3. Prosecution. 4. Process. 5. Arraignment, and its incidents. 6. Plea, and issue. 7. Trial, and conviction. 8. Judgment, and its consequences. 9. Reversal of judgment. 10. Reprieve, or pardon. 11. Execution. All which will be discussed in the subsequent part of this book.

An *arrest*, in the sense here referred to, is the apprehending or restraining of the person of a man, in order that he shall be forthcoming to answer an alleged or suspected crime(*b*). [To this arrest all persons whatsoever are, without distinction, equally liable in criminal cases ; and, in general, an arrest may be made four ways. First. By warrant. Secondly. By an officer without warrant. Thirdly. By a private person, also without warrant. Fourthly. By a hue and cry.]

(*a*) Vide sup. p. 91. It has been elsewhere explained in this work, that some misdemeanors, and even the *felonious* offence of larceny, may, in certain cases, be dealt with, not by way of indictment, but by a summary method of proceeding before a

justice or justices. (Vide sup. pp. 410, 412.)

(*b*) In civil cases, also, a debtor who is about to flee the country may be *arrested*, in order to secure his being forthcoming (vide sup. vol. III. p. 592).

First. A *warrant* may be granted, in cases of treason or other offence affecting the government, by the privy council or one of the secretaries of state (c). Any judge also of the Court of Queen's Bench may at common law, in his character of conservator of the peace (d), issue his warrant to bring before him for examination a person charged with felony (e); and by 36 Geo. III. c. 77, s. 18, 35 Geo. III. c. 96, and 48 Geo. III. c. 58, such judge has authority to grant a warrant for commitment in cases of misdemeanor, upon indictment found or information granted in the Court of Queen's Bench. A like power to which is exercised by courts of oyer and terminer, and by the justices at sessions upon indictments, either for felony or misdemeanor, found within their jurisdictions respectively (f).

But warrants are ordinarily issued by justices of the peace out of sessions; a subject on which the law has been lately consolidated by 11 & 12 Vict. c. 42 (g).

(c) 1 Chit. Cr. L. 34, 107; Hawk. P. C. b. 2, c. 16; 4 Bl. Com. 290; see *Kendal v. Row*, 1 Ld. Raym. 65; *R. v. Wilkes*, 2 Wils. 151; *R. v. Despard*, 7 T. R. 736; 11 Harg. St. Tr. 318. See also as to the power of a secretary of state to remove a prisoner by warrant from Ireland, in order to his trial in England. (*Sedley v. Arbouin*, 3 Esp. 178.) A practice had obtained in the secretary's office ever since the Restoration, grounded on some clauses in the Acts for regulating the press, of issuing *general* warrants to take up, (without naming any persons in particular,) the authors, printers and publishers of such obscene or seditious libels as were particularly specified in the warrants. When those Acts expired in 1694, the same practice was inadvertently continued in every reign, and under every administration, ex-

cept the four last years of Queen Anne, down to the year 1763. When, on such a warrant being issued to apprehend the authors, printers and publishers of a certain seditious libel, its validity was disputed; and the warrant was adjudged by the whole Court of Queen's Bench to be void. (*Money v. Leach*, 3 Burr. 1742; S. C. 1 Bl. Rep. 555.) After this case the issuing of such general warrants, was declared illegal, by a vote of the house of commons. (*Com. Journ.* 22nd April, 1766.)

(d) Vide sup. vol. II. p. 663.

(e) 1 Chit. Cr. L. 36.

(f) Ibid. 339.

(g) The statute 11 & 12 Vict. c. 42, is not to alter or affect any of the provisions in the Metropolitan Police Acts, or in the *London* Police Act [vide sup. p. 414, n. (d)].

This statute provides in substance, that in all cases where a charge, or complaint, shall be made before one justice of the peace, or more, for any county or place in England or Wales,—that any person has committed, or is suspected to have committed, any treason or other felony, or any indictable misdemeanor or offence whatsoever, within the limits of their jurisdiction: or that any person who has committed, or is suspected to have committed, such offence out of their jurisdiction (*h*), resides, or is, or is suspected to reside or be, within the same:—then, (if the party shall not be in custody,) the justice or justices may issue a warrant to apprehend him; and may cause him to be brought before them, or any other justice or justices of the same county or place, to answer for the charge or complaint, and to be dealt with according to law; or they may, at their discretion, issue a summons, in the first instance,—in lieu of a warrant,—and forbear to proceed by warrant until the summons has been disobeyed. But there is this distinction: that where a warrant in the first instance is applied for, an *information* or *complaint* in writing, and upon oath, must be laid before the justices; but where only a summons, the information or complaint may be by parol, and no oath is necessary. The form of the warrant is prescribed by the statute itself (*i*); and [a warrant properly penned, even though the magistrate who issues it should exceed his jurisdiction, will by statute 24 Geo. II. c. 44, at all events indemnify the officer who executes the same ministerially.] On the other hand, [when a warrant is received by the officer, he is bound to execute it so far as the jurisdiction of the magistrate and himself extends;] and he may break open doors, in order

(*h*) 11 & 12 Vict. c. 42, s. 1. By sect. 2 this extends to offences committed within the jurisdiction of the Admiralty, or on land beyond the seas;—provided the case be one for which an indictment may legally be preferred in England or Wales.

(*i*) The form of the warrant and summons, and of all other proceedings under the Act, is given in a schedule thereto. We may remark here, that the case is the same, with respect to all other instruments used in the proceedings.

to execute a warrant for treason, felony, or actual breach of the peace,—provided, on demand, admittance cannot otherwise be obtained (*k*). Nor is there any immunity from arrest for any such offence, in the night time; nor from an arrest, for any indictable offence, on Sundays (*l*). A justice of the peace may also issue a warrant, not only to apprehend a person suspected of felony, but to search his premises for goods alleged to be stolen; and by 24 & 25 Vict. c. 96, s. 103 (*m*), if any credible witness shall, upon oath, prove before a justice of the peace a reasonable cause to suspect that any person has in his possession, or on his premises, any property whatsoever, in respect to which any offence punishable under that Act shall have been committed,—the justice may grant a warrant to search for such property, as in the case of stolen goods: and any person to whom any such property shall be offered to be sold, pawned, or delivered, is required, (if in his power,) to apprehend and carry before a justice of the peace the person offering the same, together with such property.

[A warrant from the chief or other justice of the court of King's Bench extends all over the kingdom; and is *tested*, (or dated,) *England*; not *Oxfordshire*, *Berks*, or other particular county. But the warrant of a justice of the peace in one county, as *Yorkshire*, must be *backed*, that is, indorsed by a justice of the peace in another, as *Middlesex*, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county, but the practice of backing warrants had long prevailed without law, and was at last authorized by statutes;] of which the most recent are the 11 & 12 Vict. c. 42, and the 14 & 15 Vict. c. 55, s. 18. By these statutes a warrant issued in *England* or *Wales*

(*k*) 1 Chit. Cr. L. 49; *Rawlins v. Ellis*, 16 Mee. & W. 172.

(*l*) 29 Car. 2, c. 7, s. 6, and see 11 & 12 Vict. c. 42, s. 4. An arrest (or other execution) in *civil* cases,

is not permitted on Sundays, vide sup. vol. III. p. 680, n. (*a*).

(*m*) Re-enacting 7 & 8 Geo. 4, c. 29, s. 63, which was repealed by 24 & 25 Vict. c. 95.

may be backed, not only in another English county or place, but in Scotland, Ireland, or the Channel Islands, or *vice versâ* (n).

Secondly. [Arrest by officers *without warrant*, may be executed, 1. By a justice of the peace, who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence (o); 2. The sheriff; and, 3. The coroner may apprehend any felon within the county, without warrant (p); 4. The constable, of whose office we formerly spoke, hath great original and inherent authority with regard to arrests (q). He may, without warrant, arrest any one for] a treason, felony, or [breach of the peace committed in his view, and carry him before a justice of the peace.] So upon a reasonable charge of treason, or felony,—or of a dangerous wounding, whereby felony is likely to ensue,—or, upon his own reasonable suspicion that any of such offences have been committed, the constable may, without

(n) The provisions of 11 & 12 Vict. c. 42, as to backing warrants, are by 11 & 12 Vict. c. 43, s. 3, extended to warrants in cases of summary conviction. We may also notice here other enactments of a character somewhat analogous. By 6 & 7 Vict. c. 34, (amended by 16 & 17 Vict. c. 118,) provisions are made as to the apprehension in the united kingdom, of persons committing treason and felony in any of her majesty's dominions *out of* the united kingdom. And *vice versâ*, as to the apprehension in those dominions, of persons so offending in the united kingdom. By 6 & 7 Vict. c. 75, (amended by 8 & 9 Vict. c. 120,) provisions are also made for carrying into effect a convention entered into by her majesty and the late King of the French, (determinable at pleasure,) for the apprehension and ex-

tradition of offenders in the two countries, respectively, in cases of murder or attempts to commit murder; forgery; or fraudulent bankruptcy. By 6 & 7 Vict. c. 76, (amended by 8 & 9 Vict. c. 120,) regulations are made for carrying into effect a similar convention with the United States of America, in cases of murder, or attempts to commit murder; piracy; arson; robbery; forgery, or uttering forged paper. And by 25 & 26 Vict. c. 70, for carrying into effect a similar convention with the King of Denmark in reference to murder, attempts to murder, forgery, and fraudulent bankruptcy.

(o) 1 Hale, P. C. 86.

(p) Jervis on Coroners, 21.

(q) Vide sup. vol. II. p. 672 et seq.

warrant, arrest the party so charged or suspected; and he will be justified in doing so though it should afterwards turn out that the party is innocent, or even that no such offence has been in fact committed (*r*). He is also authorized in these cases, as well as upon a justice's warrant, to break open doors. And by 24 & 25 Vict. c. 97, s. 57, and by c. 100, s. 66 (*s*), it is now enacted that any constable or peace officer may take into custody, without a warrant, any person whom he shall find lying or loitering in any highway, yard or other place during the night, and whom he shall have good cause to suspect of having committed, *or of being about to commit*, any felony mentioned in those Acts respectively; and that he shall take such person as soon as reasonably may be before a justice of the peace, to be dealt with according to law (*t*). 5. [Watchmen, either those appointed by the statute of Winchester, (13 Edw. I. c. 4,) to keep watch and ward in all towns from sunsetting to sunrise, or such as are mere assistants to the constable, may, *virtute officii*, arrest all offenders, and particularly nightwalkers; and commit them to custody till the morning (*u*).

Thirdly. Any *private* person (and *à fortiori* a peace officer), that is *present when any felony is committed*, is bound by the law (without warrant) to arrest the felon, on pain of fine and imprisonment,] if he is negligently per-

(*r*) See *Hogg v. Ward*, 3 H. & N. 417; *Griffin v. Coleman*, 4 H. & N. 265.

(*s*) These Acts are the Acts of 1861, which purport to relate to offences against the *person*, and to *malicious injuries* to property.

(*t*) Moreover, within the *metropolitan police district*, a constable may take into custody, without warrant, all persons whom he may find, between sunset and the hour of eight in the morning, loitering or lying about and unable to give a satisfactory account of them-

selves,—or any persons charged with aggravated assaults,—or persons offending against the metropolitan police Acts, whose address cannot be ascertained. (See 10 Geo. 4, c. 44; 2 & 3 Vict. c. 47, ss. 36, 64, 65; 17 & 18 Vict. c. 33, s. 1.) The metropolitan police district embraces the whole county of Middlesex, and all other parishes or places within fifteen miles of Charing-cross,—with the exception of the city of London, which maintains a separate police establishment.

(*u*) 2 Hale, P. C. 90, 91.

mitted to escape (*v*); and any person whatsoever may also, by 14 & 15 Vict. c. 19, s. 11, apprehend any person found committing *any* indictable offence, by *night*. Moreover, by 24 & 25 Vict. c. 96, s. 103 (*x*), any person may apprehend, without warrant, any person found committing any of the offences punishable under that Act (either upon indictment or summary conviction), except only the offence of angling in the day time: and may carry such offender and the property (if any) found on him to a neighbouring justice, by him to be dealt with according to law. And, by 24 & 25 Vict. c. 97, s. 61 (*y*), any person found committing any offence against that Act may be immediately apprehended, and carried to a justice, without warrant, either by a peace officer, or the owner of the property injured, or his servant, or other person authorized by such owner. And, by 24 & 25 Vict. c. 99, s. 31 (*z*), any person whatsoever may apprehend any person found committing any offence against that Act, and deliver him up to some peace officer (*a*). Moreover, at common law, any person (whether a peace officer or not) may, without warrant, in the case of any felony committed in their presence, justify breaking open doors in pursuit of the offender: and may arrest any one for felony *on probable suspicion* (*b*). But there is this distinction between the case of the peace officer, and that of a private person; that the former is protected, (as we have seen,) though it should turn out that no such crime as supposed had been in fact committed by any one (provided he had reasonable ground for suspecting the party arrested): but the latter ~~acts more~~ ^{is more} at his peril; and is not protected, unless he can prove ^{an} actual commission of the crime ~~by some one~~, as well as a reasonable ground for suspecting the particular person (*c*). It is also

(*v*) Hawk. P. C. b. 2, c. 12.

(*x*) This is the Act of 1861, as to *larceny* and similar offences.

(*y*) This is the Act of 1861, as to *malicious injuries* to property.

(*z*) This is the Act of 1861, as to

offences relating to the *coin*.

(*a*) 24 & 25 Vict. c. 99, s. 31.

(*b*) 2 Hale, P. C. 78:

(*c*) Fost. 318. See *Adams, v. Moore*, 2 Selw. N. P. 865; *Moore v. Ræye*, 4 Taunt. 34; *Beckwith v.*

to be observed, that a private person cannot, on mere suspicion, justify breaking open doors; which a constable (as before shown),—though acting without a warrant,—is competent to do (*d*).

Fourthly. [There is yet another species of arrest, wherein both officers and private men are concerned; and that is upon a *hue* and *cry* raised upon a felony committed (*e*). A *hue*, (from *huer*, to shout) and *cry*, *hutesium et clamor*, is the old common law process of pursuing with horn and with voice, all felons, and such as have dangerously wounded another (*f*).] If in a hue and cry, the constable, or peace officer, concur in the pursuit, he has [the same powers, protection and indemnification, as if acting under a warrant of a justice of the peace (*g*).] Indeed all those who join in following upon a hue and cry that has been raised,—and that whether a constable be present or not,—will be justified in their apprehension of the party pursued, even though it should ultimately turn out that he is innocent, or that no felony has been committed (*h*); and where the party pursued has taken refuge in a house, may break open the door to secure him, if admittance be refused (*i*). But if a man wantonly or maliciously raises a hue and cry without cause, he is liable to fine and imprisonment (*k*); and is also liable to an action at the suit of the party injured.

In order to encourage the apprehension of offenders in certain cases, it is provided by 7 Geo. IV. c. 64, s. 28,—repealing previous enactments of a similar kind,—that when any person shall appear to any court of oyer and

Philby, 6 B. & C. 635; Williams v. Crosswell, 2 C. & K. 422.

(*d*) 4 Bl. Com. 292. See Smith v. Shirley, 3 C. B. 142. As to homicide in resisting an arrest by a private person, see 2 Hale, P. C. 84; Foster, 272, 309, 318.

(*e*) As to hue and cry, see 2 Hale, P. C. 100, et seq.

(*f*) The statutes relating to hue and cry, 13 Edw. 1, st. 2, cc. 1 and 4; 27 Eliz. c. 13, and 8 Geo. 2, c. 16; are repealed by 7 & 8 Geo. 4, c. 27.

(*g*) Vide sup. p. 157.

(*h*) Hawk. P. C. b. 2, c. 12, s. 16.

(*i*) 2 Hale, P. C. 102.

(*k*) Hawk. P. C. b. 2, c. 12, s. 16.

terminer, or gaol delivery, to have been active in or towards the apprehension of any person charged with murder; or charged with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at, any other person; or with stabbing, cutting, or poisoning, or with administering any thing to procure the miscarriage of any woman; or with rape; or with burglary or felonious housebreaking; or with robbery on the person; or with arson; or with horse stealing, bullock stealing, or sheep stealing; or with being accessory before the fact to any of the offences aforesaid; or with receiving any stolen property knowing the same to have been stolen;—every such court is authorized, in any of the cases aforesaid, to order the sheriff of the county to pay to such person such sum of money as shall seem a reasonable and sufficient compensation for his, her, or their expenses, exertions and loss of time, in or towards such apprehension (*m*). But this power is to be exercised subject to such regulations, as to the rate of allowance, as shall be made from time to time by a principal secretary of state. And by 14 & 15 Vict. c. 55, s. 8, the above power of ordering compensation is extended, under certain limitations as to the amount, to any court of sessions of the peace,—in reference to such of the above-mentioned offences as they have power to try (*n*).

(*m*) And see 7 Geo. 4, c. 64, s. 30, as to compensation to the families of those who are *killed* in attempting to apprehend persons charged with such offences as are mentioned in the text; and 14 & 15 Vict. c. 55, s. 7, providing that nothing in that Act, as to the regulations under which the power of allowance is to be exercised, shall interfere with the power of the court to order payment to any person who shall

have shown extraordinary courage, diligence, or exertion in the apprehension. See also 19 & 20 Vict. c. 36, s. 13, as to compensation in cases removed to trial to the Central Criminal Court, under the provisions of that Act.

(*n*) The amount is limited to 5*l.* to any one person. As to the jurisdiction of the sessions, vide sup. pp. 397, 398.

CHAPTER XVII.

OF COMMITMENT AND BAIL.

[WHEN a delinquent is arrested, by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice (or justices) of the peace; and how he is there to be treated, is now to be shown under the head of *commitment* and *bail*(a).

The justice or justices before whom such prisoner is brought, are bound immediately to examine the circumstances of the crime alleged(b);] and to this end, the following provisions are made by the statute 11 & 12 Vict. c. 42, s. 17 (c); viz. that he or they shall take, in the presence of the prisoner, (who shall be at liberty to put questions to any witness produced against him,) the statement on oath or affirmation of those who know the facts of the case, and shall put the same into writing:—that the room in which such examinations (or *depositions*) are taken shall not be deemed an open court; and that it shall be lawful for the justice or justices, if it appear to them most conducive to the ends of justice, to order that no person shall have access to the same(d):—that after the depositions have been taken, and signed respectively by the witnesses, and also by the justice or justices, they shall be read over to the prisoner, who shall be asked if

(a) Vide sup. p. 424.

(b) He ought to be brought before the justice, without delay. (Wright v. Court, 6 D. & R. 623.)

(c) This subject was at one period regulated by 2 & 3 Ph. & M. c. 40,

and afterwards by 7 Geo. 4, c. 64. The first of these Acts was repealed by the second; and this last, (so far as this subject is concerned,) by 11 & 12 Vict. c. 42.

(d) 11 & 12 Vict. c. 42, s. 19.

he wishes to say anything in answer to the charge (c), but at the same time cautioned that he has nothing to hope from any promise, or to fear from any threat, that may have been held out to him; and that, (notwithstanding any such promise or threat,) any thing he may then say may be read in evidence against him upon his trial;—and that whatever he shall then say in answer thereto shall be taken down in writing, and read over to him, and signed by the justice or justices (d). And further:—that if, when all the evidence against the accused person shall have been heard, the justice or justices shall be of opinion that it is not sufficient to put him upon his trial, they shall forthwith order him to be discharged; but if they shall be of the opposite opinion, or if the evidence given raise a strong or probable presumption of his guilt (e), they shall either commit him to prison to take his trial, (as hereafter mentioned,) or admit him to bail,—that is, allow him to be discharged, on entering into a recognizance, (with some sufficient surety or sureties,) to appear and surrender himself to custody, to take his trial on such indictment as may be found against him, in respect of the charge in question, at the next assizes or sessions of the peace.

The justices, however, have no power to admit any person to bail for *treason*; nor shall bail, in that case, be allowed except by order of a secretary of state, or by the Court of Queen's Bench, or a judge thereof in vacation: while, on the other hand, they are bound to admit to bail in all cases of misdemeanor, except such as the Act of 11 & 12 Vict. c. 42, particularly enumerates; and as to all felonies (treason excepted), as well as to the misdemeanors

(c) 11 & 12 Vict. c. 42, s. 18. It is not the practice to examine the prisoner himself, otherwise than by thus calling on him for his defence; and this corresponds with the ancient law; "for by the canon law,"

says Blackstone, (vol. iv. p. 206,) "*nemo tenetur prodere seipsum.*"

(d) 11 & 12 Vict. c. 42, s. 18. As to this provision, see Reg. v. Stripp, 1 Dearsley's C. C. R. 648.

(e) Sect. 25.

so enumerated, they have a discretionary power either to admit to bail (*f*), or to commit to prison (*g*).

[To refuse or delay to bail any person bailable, is an offence against the liberty of the subject, in any magistrate, by the common law (*h*), as well as by the statute of Westminster the first, 3 Edw. I. c. 15, and the *Habeas Corpus* Act, 31 Car. II. c. 2 (*i*). And lest the intention of the law should be frustrated, by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by 1 W. & M. st. 2, c. 1, that excessive bail ought not to be required; though what bail shall be called excessive must be left to the courts, on considering the circumstances of the case, to determine. And on the other hand, if the magistrate take insufficient bail, he is liable to be fined, if the criminal doth not appear (*k*).]

Such, as the law now stands, is the power of the justices of the peace in bailing prisoners brought before them (*l*).

(*f*) Formerly there were many other cases besides treason, in which justices of the peace had no power to bail; for example, that of murder and of arson. (See 4 Bl. Com. 299.)

(*g*) The misdemeanors for which justices are *not* obliged to take bail, are as follows—assault with intent to commit felony; obtaining or attempting to obtain property by false pretences; receiving property stolen or obtained by false pretences; perjury or subornation of perjury; concealing the birth of a child by secret burying or otherwise; wilful and indecent exposure of the person; riot; assault in pursuance of a conspiracy to raise wages; assault upon a police officer in the execution of his duty, or upon any person acting in his aid; neglect or breach of duty as a peace officer; and any

misdemeanor for prosecution of which, costs may be allowed out of the county rate. (11 & 12 Vict. c. 42, s. 23.)

(*h*) Hawk. P. C. b. 2, c. 15, s. 13. See *Queen v. Badger*, 4 Q. B. 468; *Linford v. Fitzroy*, 13 Q. B. 240.

(*i*) See also 56 Geo. 3, c. 100.

(*k*) Hawk. P. C. b. 2, c. 15, s. 6; and see 7 Geo. 4, c. 64, ss. 5, 6; *R. v. Saunders*, 2 Cox's Cr. C. 249.

(*l*) The court before which a prisoner is brought to plead, has also power to bail him. (4 Bl. Com. 297.) As to the power of bailing in the metropolitan police courts, see 2 & 3 Vict. c. 71, s. 36; and in the case of juvenile offenders charged with simple larceny, see 10 & 11 Vict. c. 82, s. 5. See also 18 & 19 Vict. c. 126, ss. 5, 6, as to bailing persons charged with larceny, &c., under that Act. And 22 Vict. c. 33, enabling coroners

It is to be understood, however, that in this matter the Court of Queen's Bench exercises a paramount jurisdiction;—having authority to bail, not only in cases where the charge is originally before that court, but also in cases where it is brought before justices of the peace, and bail is refused by them. Nor is there any limit whatever to the power of the Queen's Bench in this particular: for [that court (*m*),—or any judge thereof, in time of vacation (*n*),—may bail for any crime whatsoever, be it treason (*o*), murder (*p*) or any other offence, according to the circumstances of the case.] It is not usual, however, either for the Court of Queen's Bench, or for magistrates, to admit to bail in any case of felony, except under circumstances of a special and favourable kind (*q*).

Supposing no bail to be allowed, or none to be found by the accused, he is then to be committed by warrant of the justice, or justices (*r*), to the common gaol or house of correction, to be there safely kept until delivered by due course of law (*s*). [But this imprisonment is only for safe custody, and not for punishment; and therefore, in this dubious interval between the commitment and trial, a prisoner ought to be treated with the utmost humanity; and neither be loaded with needless fetters, nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement.]

to admit to bail persons charged with manslaughter, by the verdictⁿ of a coroner's jury.

(*m*) 2 Inst. 189; Latch. 12; Vaug. 157; Comb. 111, 298; 1 Com. Dig. 495.

(*n*) Skin. 683; Salk. 105; R. v. Dalton, Stra. 911; 1 Com. Dig. 497.

(*o*) In the reign of Queen Elizabeth, however, it was the unanimous opinion of the judges, that no court could bail a person committed, on a charge of high treason, by any of the queen's privy council. (1 Anders. 298.)

(*p*) Antiently felonious homicide,

seems to have been an exception.

"*In omnibus placitis de feloniam solet accusatus per plegios dimitti, præterquam in placito de homicidio.*" (Glan. l. 14, c. 1.) "*Sciendum tamen quod, in hoc placito, non solet accusatus per plegios dimitti, nisi ex regia potestatis beneficio.*" (Ibid. c. 3.)

(*q*) See Barronet's case, 1 Dearsley's C. C. R. 51.

(*r*) 11 & 12 Vict. c. 42, s. 25. The form of this warrant is prescribed by the schedule to the Act.

(*s*) See the law as to the place of commitment, more fully stated, sup. vol. III. p. 234.

In either case, whether of bailing or commitment, the accused is entitled to demand, from the person having the custody of the same, copies of the examinations (or depositions) on which he shall have been bailed or committed (*t*), upon payment for them at a reasonable and prescribed rate. And the justice or justices are also empowered, in either case, to bind over by recognizance the prosecutor and witnesses to appear at the next assizes or sessions of the peace, at which the accused is to be tried, then and there to prosecute or to give evidence. And the several recognizances so taken, together with the written information (if any); the depositions; the statement of the accused; and the recognizance of bail (if any);—the justice or justices are required to deliver, or cause to be delivered, to the proper officer at such assizes or sessions, before or at the opening of the court, on the first day of its sitting (*u*).

(*t*) 11 & 12 Vict. c. 42, s. 27. See *Queen v. Lord Mayor of London*, 5 Q. B. 555; *R. v. Davies and others*, 1 L. M. & P. 323.

(*u*) 11 & 12 Vict. c. 42, s. 20. By 19 & 20 Vict. c. 16, where any person shall have been committed or held to bail for any felony or misdemeanor alleged to have been committed out of the jurisdiction of the Central Criminal Court, (as to which, vide sup. p. 396,)—the Queen's Bench, (or any judge thereof in vacation,) may if it shall appear expedient for the ends of justice, order the trial of such person to take place at the Central Criminal Court. In such case, the

examining justice, coroner, or other officer in whose custody the indictment or inquisition against the person charged may be,—must forthwith transmit to the proper officer of the Central Criminal Court any recognizances, depositions, examinations or informations relating to the offence charged, to be kept among the records of the Central Criminal Court. And the gaoler or keeper of any gaol or house of correction, in which the person charged is confined, is, without writ of *habeas corpus* or other writ for that purpose, to cause such person to be removed to Newgate. (19 & 20 Vict. c. 16, s. 4.)

CHAPTER XVIII.

OF THE SEVERAL MODES OF PROSECUTION.



[THE next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation (*a*): and this is either upon a previous finding of the fact by an inquest or grand jury, or without such previous finding. The former way, is either by *presentment* or by *indictment*.

I. A presentment, *generally* taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by a grand jury, of any offence from their own knowledge or observation, without any bill of indictment, laid before them at the suit of the Crown (*b*):—as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it (*c*). An inquisition of office is the act of a jury summoned by the proper officer to inquire of ~~matters~~ relating to the Crown, upon evidence laid before them (*d*).] Such inquisitions [may be afterwards traversed and examined (*e*); as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide: for, in such cases, the offender so presented must be arraigned upon

(*a*) Vide sup. p. 424.

(*b*) Lamb. Eirenarch. l. 4, c. 5.

(*c*) 2 Inst. 739.

(*d*) Vide sup. p. 72.

(*e*) Jervis on Coroners, 282.

[this inquisition, and may dispute the truth of it: which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.

II. An *indictment* is a written accusation of one or more persons of a felony or misdemeanor, preferred to, and presented upon oath by, a grand jury (*f*). To this end the sheriff of every county is] directed by a precept, issued for the purpose, [to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and loyal men of the county (*g*), —to inquire into, present, do, and execute all those things which, on the part of] our lady the queen, [shall then and there be commanded them (*h*).] At the sessions of the peace, their qualification is further regulated by stat. 6 Geo. IV. c. 50, s. 1, and is the same as required for common jurors in the trial of civil causes (*i*). At courts of oyer and terminer and general gaol delivery, their qualification is not absolutely defined by law: [they ought to be freeholders, but to what amount is uncertain (*j*).] However, they are usually gentlemen of the best figure in the county (*k*). As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three, that twelve may be a majority (*l*). Which number, as well as the constitution itself, we find exactly described so early as the laws of King Ethelred (*m*):—
“Exeant seniores duodecim thani, et præfectus cum eis, et jurent super sanctuarium quod eis in manus datur,

(*f*) In the case of a Quaker, Moravian or Separatist, the presentment of the grand juror may be upon solemn affirmation. (Vide sup. vol. II. p. 353.) As to its being unnecessary in legal proceedings to state the fact that certain jurors made affirmation, see 6 & 7 Vict. c. 85, s. 2.

(*g*) Prior to the statute 6 Geo. 4, c. 50, the words “some out of every hundred” used to be added here.

(*h*) 2 Hale, P. C. 154.

(*i*) Vide sup. vol. III. p. 625.

(*j*) 2 Hale, P. C. 155.

(*k*) See 1 Chit. Cr. L. p. 238.

(*l*) R. v. Marsh, 6 Ad. & El. 236

(*m*) Wilk. LL. Angl. Sax. 117.

[*quod nolint ullum innocentem accusare nec aliquem noxium celare.*] In the time of King Richard the first (according to Hoveden), the process of electing the grand jury, ordained by that prince, was as follows:—four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably found too large and inconvenient;] but the traces of this institution long remained: for until dispensed with by 6 Geo. IV. c. 50, s. 13, it was held to be necessary that some of the jury should be summoned out of every hundred(*n*). [This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw to sit and receive indictments, which are preferred to them] in the name of the Queen, [but at the suit of any private prosecutor: and they are only to hear evidence on behalf of the prosecution(*o*): for the finding of an indictment, is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it(*p*). A

(*n*) 2 Hale, P. C. 154; 4 Bl. Com. 303.

(*o*) By 19 & 20 Vict. c. 54, the foreman is authorized to administer an oath, (or affirmation where such is allowed by law,) to all persons appearing before the grand jury to give evidence. Before this Act, such persons had to be sworn in open court.

(*p*) Upon an indictment for high treason against the Earl of Shaftesbury, in the year 1681, the evidence was given *in public* before the grand jury at the Old Bailey, and the gentlemen of the jury expressing

some doubts with regard to the legality of the proceeding, Lord C. J. Pemberton and C. J. North both declared that it had always been the practice to examine the witnesses publicly before the grand jury, whenever it had been requested by those who prosecuted for the king. (3 Harg. St. Tr. 417) But it is apprehended this is the last instance of such a procedure. (Christian's Blackstone.) It seems that an improper mode of swearing the witnesses before a grand jury, will not vitiate the indictment. *R. v. Russel*, 1 Car. & M. 247.

[grand jury, however, ought to be thoroughly convinced of the truth of an indictment, so far as their evidence goes : and not to rest satisfied merely with remote probabilities : a doctrine that might be applied to very oppressive purposes (*q*).] By a recent statute also, 22 & 23 Vict. c. 17, passed to prevent vexatious indictments, no bill of indictment shall be presented to the grand jury or found by them for offences of a certain description, unless there is such security given as in the Act mentioned against vexation in the proceeding, or unless it shall have been preceded by such circumstances as in the Act mentioned and therein considered as a check on vexation (*r*).

[The grand jury are sworn to inquire only for the body of the county, *pro corpore comitatús*,] but for no other part of the kingdom, [and therefore they cannot regularly inquire of a fact done out of the county for which they are sworn, unless particularly enabled by Act of Parliament. And to so high a nicety was this matter antiently carried, that where a man was wounded in one county and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them :] but by statute 2 & 3 Edw. VI. c. 24, he might be indicted in the county where the party died ; and by statute 7 Geo. IV. c. 64, (repealing that of Edward the sixth,) he is now indictable in either county. Also by 24 & 25 Vict. c. 100, s. 10, if the felonious stroke, poisoning, or other hurt be in England or Ireland, and the death on the sea, or out of England or Ireland, or *vice versa*—the offenders and their accessories may be indicted in the

(*q*) St. Tr. iv. 183.

(*r*) The offences specified in the Act are the following :—Perjury, subornation of perjury, conspiracy, obtaining property by false pretences, keeping a gambling house, keeping a disorderly house, and any indecent assault. The security consists in the prosecutor being bound

by recognizance to prosecute, or give evidence, or the accused having been committed to or detained in custody, or bound by recognizance to appear, &c., or the indictment having been preferred by the direction of such court, judge, or public functionary as referred to in the Act.

county or place where either the death, stroke, poisoning, or hurt shall happen (*r*). [And so in some other cases; as particularly where *treason* is committed out of the realm, it may be inquired of] in the Queen's Bench, in any county where that court sits: or, under a special commission of oyer and terminer, [in any county within the realm, as the Crown shall direct, in pursuance of statutes 26 Hen. VIII. c. 13;] 28 Hen. VIII. c. 15; [35 Hen. VIII. c. 2, and 5 & 6 Edw. VI. c. 11 (*s*).] So, under 42 Geo. III. c. 85, all offences committed by persons employed by the Crown in any station abroad, in the exercise or under colour of their office, may be prosecuted in the Queen's Bench in England (*t*). So, also, offences committed at sea, or within the Admiralty jurisdiction made by 4 & 5 Will. IV. c. 36, s. 22, and 7 & 8 Vict. c. 2 (*u*),—may be inquired of and determined in our own courts of assize, oyer and terminer, and gaol delivery (*x*). To which we may add that by 24 & 25 Vict. c. 94, s. 7, the offence of a person accessory to any felony, wholly committed within England or Ireland, may be tried by any court having jurisdiction to try the principal felony, or to try any felonies committed in any county or place in which the act making such person accessory was committed; and that in every other case, an accessory may be tried by any court with jurisdiction to try his principal, or to try any felonies in the place where the accessory was apprehended,—wherever the principal felony was com-

(*r*) This provision re-enacts 9 Geo. 4, c. 31, s. 8 (repealed by 24 & 25 Vict. c. 95). As to its construction, see *Reg. v. Lewis*, 1 Dears. & B. 182. By 23 & 24 Vict. c. 122, the colonies may make a similar enactment.

(*s*) Another Act of 33 Hen. 8, c. 23, is repealed by 9 Geo. 4, c. 31.

(*t*) And see 11 & 12 Will. 3, c. 12; and 8 East, 31.

(*u*) And see 17 & 18 Vict. c. 104,

s. 67, by which offences committed by *British seamen*, out of her majesty's dominions, are to be deemed to have been committed within the Admiralty jurisdiction.

(*x*) Vide *sup.* p. 392. In certain cases, however, by 12 & 13 Vict. c. 96, offences committed within the Admiralty jurisdiction, may be tried in the courts of the colony, (including *India*, see 23 & 24 Vict. c. 88,) where the person is charged.

mitted. Moreover any indictable offence, mentioned in any of the Acts passed in the year 1861 for the consolidation of the statute law relating to offences against the person, to larceny, to malicious injuries to property, to coinage offences, and to forgery, which shall be committed within the admiralty jurisdiction of England or Ireland, may be dealt with, inquired of, tried and determined in any county or place in which the offender shall be apprehended or be in custody (*y*). In addition to which, there are to be found in the statute book, a variety of other and more specific exceptions from the principle that an offender must be indicted and tried in the county in which the offence is committed,—which have been introduced from time to time, to prevent the failure of justice, or to promote its convenient administration (*z*). There are also the following more general provisions. By 38 Geo. III. c. 52, where an offence has been committed within a county corporate (*a*), the indictment may be preferred to the jury of the next adjoining county (*b*). By 7 Geo. IV. c. 64, s. 12, where any felony or misdemeanor shall be

(*y*) See 24 & 25 Vict. c. 100, s. 68; c. 96, s. 115; c. 97, s. 72; c. 99, s. 36; c. 98, s. 36.

(*z*) See as to the offences of *extortion*, 31 Eliz. c. 5, s. 4, (et 2 Chit. Cr. Law, 294, n.)—As to *robberies, &c. in Newfoundland*, 10 & 11 Will. 3, c. 25, s. 13.—As to *burning ships, &c. out of the realm*, 12 Geo. 3, c. 24, s. 2.—As to *misdemeanors in India*, 13 Geo. 3, c. 63.—As to *seducing soldiers, &c.*, 37 Geo. 3, c. 70, s. 2; 57 Geo. 3, s. 7.—As to *offences against stamp Acts*, 53 Geo. 3, c. 108, s. 24; 55 Geo. 3, c. 184, s. 8.—As to *Foreign Enlistment Act*, 59 Geo. 3, c. 69, s. 9.—As to *offences by pilots*, 1 & 2 Geo. 4, c. 75, s. 22.—As to *escapes, prison breach, and rescue*, 4 Geo. 4, c. 64, s. 44.—As to *offences against*

the excise, 7 & 8 Geo. 4, c. 53, s. 43.—As to *offences committed in coaches or vessels*, 7 Geo. 4, c. 64, s. 13. (See Sharpe's case, 1 Dearsley's C. C. R. 415.)—As to *offences against the Post Office*, 7 Will. 4 & 1 Vict. c. 36, s. 37.—As to *offences against the customs*, 16 & 17 Vict. c. 107, s. 304.—As to *offences committed on British ships*, 18 & 19 Vict. c. 91, s. 21. (See *The Queen v. Lopez*, 27 L. J. (M. C.) 48.)

(*a*) Vide sup. p. 137. This enactment does not extend to London, Westminster or Southwark. (See 38 Geo. 3, c. 52, s. 10; 5 & 6 Will. 4, c. 76, s. 109.)

(*b*) As to the indictment in such cases, see 14 & 15 Vict. c. 100, s. 23.

committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another,—every such felony or misdemeanor may be dealt with and tried in any of the counties (*c*). And by 4 & 5 Will. IV. c. 36, s. 3, it is provided as to all offences committed within the jurisdiction of the “Central Criminal Court” (*d*), that the whole metropolitan district over which it extends shall be considered, for the purpose of indictment, as one county (*e*). Besides all which, it is to be remarked in reference to this subject, that, independently of legislative provision, it is in the nature of some offences to admit, at the common law, of inquiry and trial in more counties than one. Thus in treason committed within the realm, the indictment may be in any county, in which any one overt act can be proved (*f*); and in conspiracy, in any county in which any act may have been committed in furtherance of the common design (*g*). So if a man commit a simple larceny in one county, and carry the goods with him into another, he may be indicted in either: for the law considers this as a taking in both (*h*).

(*c*) As to this provision, see *R. v. Mitchell*, 2 Gale & D. 274.

(*d*) As to this court, vide sup. p. 396.

(*e*) The jurisdiction of this court also comprises offences committed at sea, (vide sup. p. 392). It may be observed here, that persons convicted in this court on an indictment or inquisition removed thither under 19 & 20 Vict. c. 16, may, (by sect. 19 of that Act,) be sentenced and punished either in the county where the offence was committed, or at any place within the jurisdiction of the Central Criminal Court.

(*f*) *Deacon's case*, Foster, 10.

(*g*) *R. v. Brisac and Scott*, 4 East, 164.

(*h*) 1 Hale, P. C. 507; 2 Hale, P. C. 163; 4 Bl. Com. 305. Also by the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 114), if property be stolen or otherwise feloniously taken in one part of the united kingdom, and the offender afterwards have it in this possession in any other part of the united kingdom,—he may be dealt with for larceny or theft in that part where he shall so have such property, as if he had actually stolen or feloniously taken it there. And a receiver of stolen property may be dealt with in that part of the united kingdom where he shall receive the property, as if it had been originally stolen there.

[When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill “*ignoramus*,” or we know nothing of it: intimating that though the facts might possibly be true, that truth did not appear to them; but now they assert in English more absolutely, “not a true bill,” or (which is the better way) “not found,” and then the] bill is said to be “thrown out,” and the [party is discharged without further answer (*i*). But a fresh bill may afterwards be preferred to a *subsequent* grand jury (*j*) On the other hand, if they are satisfied of the truth of the accusation, they indorse upon it, “a true bill;” antiently “*billa vera*.” The indictment is then said to be *found*; and the party stands indicted. But to find a bill, there must at least twelve of the jury agree: for so tender is the law of England of the lives] and liberties [of the subjects, that no man can be convicted at the suit of the Crown] upon an indictment, [unless by the unanimous voice of twenty-four of his equals and neighbours; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards by the whole petit jury, of twelve more, finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree (*k*).] And the indictment when so found (or not found, as the case may be) is then returned, or [publicly delivered into court; and the finding of the jury openly proclaimed.

Indictments must have a precise and sufficient certainty;] and, in their margin, they always mention the county in which the offence was committed: which is done by way of *venue* (*l*), that is, by way of indicating from

(*i*) Vide post, p. 487, n. (*y*). If the bill be thrown out by the grand jury, the party must be discharged without the payment of any fees. (8 & 9 Vict. c. 114.)

(*j*) If the grand jury at the assizes or sessions have thrown out a bill, they cannot find another bill

against the same person for the same offence, at the same assizes or sessions. (R. v. Humphreys, 1 Car. & Mar. 601.)

(*k*) 2 Hale, P. C. 161.

(*l*) As to *venue* in civil cases, vide sup. vol. III. p. 595.

what county the jurors came, by whom the indictment was found. In the body also of this instrument there was formerly always inserted,—by way of more particular venue, and to indicate the place from whence the petit jury, who are afterwards to try the fact, would, according to the antient usage, have been summoned (*m*),—an allegation of the town, hamlet, or parish, in which the fact is supposed to be committed, as well as of the day of its commission (*n*). But by 14 & 15 Vict. c. 100, s. 23, it is now unnecessary to state any *venue* in the body of the indictment; but the county in the margin shall be taken to be the venue for all the facts: except where it is requisite to state a place by way of local description, and not merely as venue; in which case the place shall still be stated in the body of the indictment. So, by the same statute (sect. 24) an omission in the indictment to state the *time*, or any imperfect statement of it,—where time is not of the essence of the offence,—shall not constitute any objection (*o*). But cases occasionally occur in which time is of the essence of the offence, for example, [where there is any limitation in point of time assigned for the prosecution of offenders. As by the statute 7 Will. III. c. 3, which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned (except an assassination, designed or attempted, on the person of the sovereign), unless the bill of indictment be found within three years after the offence committed (*p*); and, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given.]

(*m*) At common law, the petit jury, who were to try the fact in issue, were summoned from the particular place where the fact in issue occurred. (See Hawk. P. C. b. 2, c. 23, s. 92.) But this principle is now obsolete with regard to both civil and criminal proceedings. And by 6 Geo. 4, c. 50, s. 13, they are now to be summoned from the body

of the county; and not even from any particular hundred within the same. (Vide sup. vol. III. p. 623, n.)

(*n*) See *R. v. Brookes*, 1 Car. & M. 543.

(*o*) The law seems to have been nearly the same, even before this statute. 4 Bl. Com. 306.

(*p*) Foster, 249.

In other respects, also, indictments must have a precise and sufficient certainty. [By statute 1 Hen. V. c. 5, all indictments must set forth the christian name, surname, and addition of the state and degree, mystery, town, or place, and the county of the offender; and all this to identify his *person* (*q*):] but if his name be unknown, and he refuse to disclose it, an indictment against him as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison, is, notwithstanding this enactment, sufficient (*r*). And now by 14 & 15 Vict. c. 100, s. 24, no want of, or imperfection in, the addition of the defendant shall vitiate the indictment; nor the designation of any person by a name of office or other descriptive appellation, instead of by his proper name. [The offence itself must also be set forth with clearness and certainty (*s*); and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus in treason, the facts must be laid to be done “treasonably and against his allegiance;” antiently, “*proditorie et contra ligeantiae suae debitum*,” else the indictment is void. In indictments for murder, it is necessary to say that the party indicted “murdered,” not “killed” or “slew,”) the other;] which, till the statute 4 Geo. II. c. 26, directing all proceedings in courts, concerning the law and administration of justice, to be in English; [was expressed in Latin by the word “*murdravit*.” In all indictments for felonies, the adverb “feloniously,” “*felonice*,” must be used; and for burglaries, also “*burglariter*,” or in English, “burglariously;” and all these to ascertain the intent. In rapes, the word “*rapuit*,” or “ravished,” is necessary, and

(*q*) In case of an indictment against a corporation, its name of incorporation may be used. (2 Gale & D. 236.)

(*r*) Anon., R. & R. C. C. R. 489.

(*s*) See Reg. v. Rowed, 3 Q. B. 180.

must not be expressed by any periphrasis; in order to render the crime certain. So in larcenies, also, the words "*felonice cepit et asportavit*," "feloniously took and carried away," are necessary to every indictment; for these only can express the very offence (*t*).] In addition to which we may remark, that where the offence is created by an Act of Parliament, the very words of the Act, containing the description of the offence, should be exactly pursued (*u*).

The precision indeed of our pleadings, (whether in criminal or civil cases,) has ever been remarkable; and up to a recent period was carried to an extravagant length, tending to an excessive subtlety, and overstrained observance of form, very prejudicial to the interests of justice. This blemish on our jurisprudence, (the result, it must be observed, of an overweening attachment to a right principle,) it has been the constant effort of modern legislation to efface; though the steps of that improvement have been cautious and progressive. To do justice to the subject, it will be necessary to refer briefly to the several reformatory provisions, or such of them as are of principal importance; but any extended notice of the former state of the law will not be requisite; as the very statement of these provisions will in general suffice to explain, at the same time, the nature of the formal grievances and abuses which it is their object to extirpate.

To pursue then the order that we adopted when the several offences themselves were under consideration, our enumeration of the modern enactments, as to the mode in which the offence is to be charged, may be as follows.

By 24 & 25 Vict. c. 100, s. 6 (*v*), it shall not be necessary, in any indictment for murder or manslaughter, to

(*t*) See *R. v. Crighton*, R. & R. C. C. R. 62. So also it is essential to state in an indictment for larceny, who was the *owner* of the article stolen. See *Sill's case*, 1 Dearsley's

C. C. R. 132.

(*u*) See *R. v. Jukes*, 8 T. R. 536.

(*v*) Re-enacting 14 & 15 Vict. c. 100, s. 4, repealed by 24 & 25 Vict. c. 95.

set forth the manner in which, or the means by which, the death was caused : but, in murder, it shall be sufficient to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased ; and, in manslaughter, to charge that the defendant did feloniously kill and slay the deceased (*x*).

By 14 & 15 Vict. c. 19, s. 5, if, on an indictment for any felony, except murder and manslaughter, the indictment shall allege that the defendant did cut, stab, or wound any person ; and the jury shall be satisfied that he is guilty of the *cutting, stabbing, or wounding*, but not satisfied that he is guilty of the felony,—he may be acquitted of the felony, and convicted of the cutting, stabbing, or wounding, and punished as if he had been indicted for that offence (*y*).

By 24 & 25 Vict. c. 96, s. 92 (*z*), in every indictment containing a charge of feloniously *stealing* property, it shall be lawful to add a count for feloniously receiving the same property knowing it to have been stolen ; and in any indictment for feloniously receiving property knowing it to have been stolen, to add a count for feloniously stealing the same property ; and where any such indictment shall have been found, the prosecutor shall not be put to his election, but the jury may find a verdict of guilty upon either count. And where such indictment shall be found against two or more persons, the jury may find all or any guilty upon either count : or one or more guilty or one count, and the other or others on the other count (*a*).

By 24 & 25 Vict. c. 96, s. 5 (*b*), it shall be lawful to insert several counts in the same indictment against the

(*x*) As to felonious homicide, vide sup. p. 143 et seq.

(*y*) As to wounding, &c., vide sup. p. 164.

(*z*) Re-enacting 11 & 12 Vict. c. 46, s. 2, repealed by 24 & 25 Vict.

c. 95.

(*a*) As to larceny, vide sup. p. 196 et seq.

(*b*) Re-enacting 14 & 15 Vict. c. 100, s. 16 ; also repealed by 24 & 25 Vict. c. 95.

same person, for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person, within six calendar months from the first to the last of such acts; and to proceed thereon for all or any of them (c).

By 24 & 25 Vict. c. 96, s. 6, if, upon the trial of any indictment for larceny, it shall appear that the property alleged to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and, in either of these last-mentioned cases, he shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within such period of six calendar months (d).

By the same Act, sect. 41, if, on an indictment for *robbery*, it shall appear to the jury that the defendant did not commit robbery, but that he did commit an assault with intent to rob, he shall not be thereby entitled to be acquitted; but the jury shall be at liberty to find him guilty of such assault, and he shall be punished as if he had been indicted for an offence of that description (e).

By the same Act (f), in any indictment for any offence under the Act committed after a previous conviction, it shall be sufficient after charging the subsequent offence, to state that the offender was at a certain time and place convicted of felony, indictable misdemeanor, or of an offence punishable upon summary conviction (as the case may be), without otherwise describing the offence of which he was so convicted.

(c) As to *counts*, vide sup. vol. III. p. 605.

(d) Re-enacting 14 & 15 Vict. c. 100, s. 17, repealed by 24 & 25 Vict. c. 95.

(e) Re-enacting 14 & 15 Vict. c.

100, s. 11, also repealed by the above Act. As to robbery, vide sup. p. 209.

(f) 24 & 25 Vict. c. 96, s. 116, re-enacting 12 & 13 Vict. c. 11, s. 4, repealed by 24 & 25 Vict. c. 95. ●

By 12 & 13 Vict. c. 103, s. 15, in an indictment or other criminal proceeding against any collector or assistant overseer appointed by the Poor-law board, for *embezzlement* or theft of the parish money or property,—he shall be deemed and taken to be the servant of the inhabitants of the parish, and shall be so described; and it shall be sufficient to state any such money or property to belong to the inhabitants of such parish, without the names of any such inhabitants being specified.

By 14 & 15 Vict. c. 100, s. 18, it is enacted, that in cases of embezzlement and obtaining money *by false pretences* (g), the indictment shall be sustained by proof that the offender embezzled or obtained any piece of coin, or any bank note, or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or any other person, and should have been returned accordingly.

By 24 & 25 Vict. c. 96, s. 72, if, upon the trial of any person indicted for embezzlement, or fraudulent application or disposition of property, it shall be proved that he took the property in any such manner as to amount in law to *larceny*, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to find that he is not guilty of the embezzlement, fraudulent application or disposition, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, or person employed in the public service or police, as the case may be; and he shall be liable to be punished as if he had been indicted for such larceny. And so also, *vice versâ*, if upon the trial of any person indicted for larceny, it shall be proved that he took the property in any such manner as to amount in law to embezzlement, fraudulent application or disposition, he shall not by reason thereof be entitled to be acquitted,

● (g) As to obtaining money under false pretences, vide sup. p. 229.

but the jury may find that he is not guilty of larceny, but is guilty of embezzlement, fraudulent application, or disposition; and he shall be liable to be punished as if he had been indicted for such offence (*i*).

By sect. 88 of the same Act, in any indictment for obtaining or attempting to obtain property by false pretences, it shall be sufficient to allege that the party accused did the act with intent to defraud, without alleging an attempt to defraud any particular person, or any ownership.

By 11 & 12 Vict. c. 88, s. 5, in any indictment for felony or misdemeanor *with respect to the Post Office*, it shall be sufficient to lay the property in, and state the same to belong to, and the act to have been committed with intent to injure or defraud, “ Her Majesty’s Postmaster-General;” and in all indictments concerning the department of the Post Office, the postmaster-general may be so described without further name or description (*h*).

By 24 & 25 Vict. c. 96, s. 94 (*l*), if upon the trial of two or more persons indicted for jointly *receiving any property*, knowing it to have been stolen, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment such of the persons as shall be proved so to have received the same.

And because it frequently happens that the principal in a felony is not in custody or amenable to justice, although several receivers at different times of property, (the subject of such felony,) may be in custody or amenable to justice, it is, for prevention of several trials, enacted,—by

(*i*) Frained on 14 & 15 Vict. c. 100, s. 13, repealed by 24 & 25 Vict. c. 25. The verdict must not be taken *generally*; in such case, see *The Queen v. Gorbutt*, 26 L. J., M. C. 47. As to embezzlement, vide sup. p. 213 et seq.

(*h*) As to larcenies in relation to the Post Office, vide sup. p. 218.

(*l*) Re-enacting 14 & 15 Vict. c. 100, s. 14, repealed by 24 & 25 Vict. c. 95. As to receiving stolen property, vide sup. p. 220.

sect. 93 of the same Act (*m*),—that whenever any property has been stolen, taken, extorted, obtained, embezzled, or otherwise disposed of in a felonious way, any number of receivers thereof at different times, may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice (*n*).

By 24 & 25 Vict. c. 97, s. 60, it shall be sufficient in any indictment for any offence against that Act, where it shall be necessary to allege an intent to *injure* or *defraud*, to allege that the party did the act with intent to injure or defraud, without specifying any particular person.

By 24 & 26 Vict. c. 98, c. 44, in any indictment for *forging*, altering, uttering, offering, disposing, or putting off any instrument, it shall be sufficient to allege that the defendant did the act with intent to defraud, without alleging an intent to defraud any particular person; and, on the trial it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the defendant did the act with an intent to defraud (*o*).

By 11 & 12 Vict. c. 12, for the *better security of the Crown and government* of the united kingdom, it is provided (sect. 5), that in any indictment for felony under that Act, it shall be lawful to charge against the offender any number of the matters, acts or deeds by which the compassings, imaginations, inventions, devices or intentions made felonious by that Act, or any of them, shall have been expressed, uttered or declared (*p*).

By 24 & 25 Vict. c. 99, s. 37, in any indictment for an offence against *the coin*, committed after a previous con-

(*m*) This provision is founded on 14 & 15 Vict. c. 100, s. 15, which was repealed by 24 & 25 Vict. c. 95.

(*n*) As to accessories after the fact generally, vide sup. p. 126.

(*o*) Framed on 14 & 15 Vict. c. 100, s. 8; repealed by 24 & 25 Vict. c. 95. As to forgery, vide sup. p. 225.

(*p*) Vide sup. p. 250.

viction for a similar offence, it shall be sufficient, after charging the subsequent offence, to state the substance and effect only, omitting the formal part of the indictment and conviction for the previous offence.

By 14 & 15 Vict. c. 100, s. 20, in any indictment for *perjury*, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath, or affirmation, or writing was taken or made or subscribed,—without setting forth the proceeding in law or equity, or any part of the proceedings in the course of which such offence was committed, and without setting forth the commission or authority of the court or person before whom it was committed (*r*).

And by sect. 21, that in every indictment for *subornation* of perjury it shall be sufficient, wherever such perjury shall have been actually committed, to allege the offence of the perjured person in such manner as would be sufficient in an indictment against him for such perjury, and then to allege that the defendant unlawfully, wilfully and corruptly did cause and procure the said person the said offence in manner and form aforesaid to do and commit; and wherever such perjury shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things thereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury. *

Besides all these, there are other provisions of a more general kind. For

By 9 Geo. IV. c. 15, all judges at nisi prius, or at any court of oyer and terminer and gaol delivery, are empowered to amend the record upon which any trial may be pending in any indictment or information for any misdemeanor, when any *variance* shall appear between any matter in

(*r*) As to perjury and subornation of perjury, vide sup. pp. 321, 323. *

writing or in print, produced in evidence, and the recital or setting forth thereof on the record. And by 11 & 12 Vict. c. 46, s. 4, it shall be lawful for any court of oyer and terminer and gaol delivery, if such court shall see fit so to do, to cause the indictment or information for any offence whatever,—when any *variance* shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment or information whereon the trial is pending,—to be forthwith amended in such particular or particulars by some officer of the court. And by 14 & 15 Vict. c. 100, s. 1 (s), whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be a variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township or place: or in the name or description of any person or persons, or body politic or corporate, therein alleged to be the owner or owners of any property (real or personal) which shall form the subject of any offence charged therein, or therein alleged to be injured or damaged, or intended to be injured or damaged, by such offence; or in the christian name or surname, or other description whatsoever of any person or persons therein named or described; or in the name or description of any matter of thing whatsoever therein named or described; or in the ownership of any property named or described therein:—it shall be lawful for the court before which the trial shall be had, in any of the above cases, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order the indictment to be amended, according to the proof, by some officer of the court or other person; on such terms as to postponing the trial, to

(s) As to the effect of this section, 132; *The Queen v. Green*, 26 L. J., see *Sill's case*, 1 Dearsley's C. & R. M. C. 17.

be had before the same or another jury, as the court shall think reasonable.

By 14 & 15 Vict. c. 100, ss. 5, 7, and 24 & 25 Vict. c. 98, ss. 42, 43, whenever it becomes necessary, in any indictment, to make any averment as to any instrument whatever, in writing, print or figures;—it shall be sufficient to describe such instrument therein by any name or description by which it is usually known, without setting forth any copy or fac-simile.

Moreover, by 14 & 15 Vict. c. 100, s. 9, if on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury that the defendant did not complete the offence, but was guilty only of an attempt to commit the same, he shall not by reason thereof be entitled to be acquitted, but the jury may find that he is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and he shall be punished in the same manner as if he had been indicted for the attempt.

By the same statute (sect. 12), if upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, he shall not by reason thereof be entitled to be acquitted of the misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court shall think fit to discharge the jury from giving any verdict, and direct such person to be indicted for felony, in which case he shall be dealt with in all respects as if he had not been put on his trial for the misdemeanor.

By sect. 18, in every indictment in which it shall be necessary to make averment as to any money, or note of the Bank of England or other bank, it shall be sufficient to describe such money, or bank note, simply as *money*, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of

coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved.

By sect. 24, no indictment (*u*) for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words “as appears by the record;” or the words “with force and arms;” or the words “against the peace;” nor for the insertion of the words “against the form of the statute,” instead of “against the form of the statutes,” or *vice versâ*; nor for that any person is designated by a name of office or other descriptive appellation, instead of his proper name; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect venue; nor for want of a proper or formal conclusion; nor for want of or imperfection in the addition of any defendant; nor for the want of the statement of the value or price of any matter or thing; or the amount of damages, injury or spoil, in any case where the value or price, or the amount of damage, injury or spoil, is not of the essence of the offence.

Lastly, by 19 & 20 Vict. c. 16, s. 17, it shall not be necessary for any purpose whatsoever, to prove that any indictment or inquiry for any offence committed, or supposed to have been committed, out of the jurisdiction of the Central Criminal Court, has been duly removed into the Court of Queen’s Bench, or duly transmitted or removed into the Central Criminal Court, under the provisions of that Act; but every such indictment shall be

(*u*) The statute of 14 & 15 Vict. c. 100, includes under the word *indictment*,—an *information*, *inquisition*, *presentment*; and also any *plea*, *replication*, and other *pleading*; and any

nisi prius record. (Sect. 36.) As to the practice and amendments under this statute, see Frost’s case, 1 Dearsley’s C. C. R. 474.

presumed to have been duly removed, or duly removed and transmitted, upon production of the same in the Central Criminal Court, by the proper officer having custody of the records of the Central Criminal Court; and no evidence or proof to the contrary shall be admitted (*v*).

III. The remaining method of prosecution to which we formerly referred (*x*), is that which dispenses with any previous finding by a jury [to fix the authoritative stamp of verisimilitude upon the accusation.] An instance of this, by the common law, [was when a thief was taken *with the mainour*, that is, with the thing stolen upon him *in manu*. For he might, when so detected, *flagrante delicto*, be brought into court, arraigned, and tried, without indictment; as, by the Danish law, he might be taken and hanged upon the spot, without accusation or trial. But this proceeding was taken away by several statutes in the reign of Edward the third;] so that the only species of regular prosecution, without a previous indictment or presentment by a grand jury, now seems to be that of information.

The term *Information* is variously applied in our law. We understand by it, either a charge on oath, laid before a justice or justices of the peace with a view to a summary conviction, and of which we have already had occasion to speak; or a complaint exhibited by a common informer in one of the superior courts of law, to recover a penalty, which some penal statute has made recoverable, by him who shall first sue, or inform, for the same in those courts; and that either on his own behalf or (more usually) on behalf of himself and the Crown jointly (*y*);—or lastly, a complaint exhibited in the name of the Crown itself in the Court of Exchequer, or the Court of Chancery, in respect of a civil claim on the part of the Crown; or in the Court of Queen's Bench, in respect of any offence under the

(*v*) See also 25 & 26 Vict. c. 65, s. 4.

(*x*) Vide sup. p. 438.

(*y*) By 22 Vict. c. 32, her Majesty

is enabled to remit penalties after conviction, though payable to some party other than the Crown.

degree of treason or other felony. It is to informations of the latter species only, that our attention is to be at present directed; all the other species having been sufficiently noticed in the course of the present work under their appropriate heads (z).

[The informations that are exhibited in the name of the sovereign,] in criminal cases, [are of two kinds; first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney-general: secondly, those in which, though the Crown is the nominal prosecutor, yet it is at the relation of some private person or common informer. And they are filed by the sovereign's coroner and attorney, usually called "the Master of the Crown Office," (who is for this purpose the standing officer of the public,) in the Court of Queen's Bench (a).

The object of the sovereign's own prosecutions, filed *ex officio* by his own attorney-general, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal: which power, thus necessary not only to the ease and safety, but even to the very existence of the executive government, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations, filed by the

(z) Vide sup. p. 415, as to informations before justices of the peace; see also sup. pp. 65, 82, as to informations in Chancery and in the Exchequer; and vol. III. pp. 551, 552, as to *qui tam* penal actions, which are substantially the same with informations *qui tam*. (See 2

Hawk. P. C. c. 20, 26.)

(a) See *R. v. Smithson*, 4 B. & Ad. 861; *R. v. Eve*, 5 Ad. & El. 780; *B. v. Larrieu*, 7 A. & E. 277. One species of such information is that in the nature of a writ of *quo warranto*, to which we had occasion formerly to refer. Vide sup. p. 16.

[master of the Crown Office, upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels and other immoralities of an atrocious kind (*b*), not peculiarly tending to disturb the government, (for those are left to the care of the attorney-general,) but which, on account of their magnitude or pernicious example, deserve the most public animadversion.] In such cases as these, the course is for the party aggrieved to move the Court of Queen's Bench for a rule to show cause why a criminal information should not be filed; which motion, in case of libel, must be supported by an affidavit expressly denying the truth of the imputation (*c*). This rule is served on the defendant according to the ordinary course of practice on motions; and, if no sufficient cause is shown, is made absolute, and an information filed accordingly (*d*). [And when an information is filed, either thus, or by the attorney-general *ex officio*, it must be tried by a petit jury of the county where the offence arises;] and for that purpose, unless the case be of such importance as to be tried at bar (*e*); it is sent down by writ of *nisi prius* into that county; and tried either by a common or special jury, like a civil action.

[There can be no doubt but that this mode of prosecution by information (or suggestion) filed on record by the attorney-general, or by the master of the Crown Office, is as antient as the common law itself. For, as the sovereign was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths that there was ~~no~~ sufficient ground for instituting a criminal suit; so, when these, his immediate officers, were otherwise sufficiently assured that a man had committed a gross misdemeanor, either personally against

(*b*) Hawk. P. C. b. 2, c. 26, s. 1; vide sup. vol. III. p. 495. A person who applies for and obtains a criminal information, is thereby concluded from bringing an action in respect of the same grievance. (See R. v. Sparrow, 2 T. R. 198, Hil.

1788; Walker v. Cooke, 16 M. & W. 314.)

(*c*) R. v. Wright, 2 Chit. Rep. 162.

(*d*) As to motions, vide sup. p. 2.

(*e*) Vide sup. vol. III. p. 614; et post, p. 504, n. (*e*).

[the king or his government, or against the public peace and good order, they were at liberty, without waiting for any further intelligence, to convey that information to the Court of King's Bench by a suggestion on record, and to carry on the prosecution in the name of the Crown. But these informations (of every kind) are confined, by the constitutional law, to mere misdemeanors only: for where-ever any] felonious (*f*) offence [is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it. And, as to those offences in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his majesty's Court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But when the statute 3 Hen. VII. c. 1, had extended the jurisdiction of the court of Star-Chamber, the members of which were the sole judges of the law, the fact, and the penalty; and when the statute of 11 Hen. VII. c. 3, had permitted informations to be brought by any informer upon any penal statute, (not extending to life or member,) at the assizes, or before the justices of the peace, who were to hear or determine the same according to their own discretion; then it was that the legal and orderly jurisdiction of the Court of King's Bench fell into disuse and oblivion; and Empson and Dudley, (the wicked instruments of King Henry the seventh,) by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices (*g*), continually harassed the subject, and shamefully enriched the Crown. The latter

(*f*) "Any *capital* offence" is the expression of Blackstone (4 Bl. Com. p. 310). And in this he agrees with Sir M. Hale (2 Hale, P. C. 151). But the doctrine seems to extend to

felonies generally, whether capital or not. See Com. Dig. "Information," A. 1; 1 Chit. C. L. 844.
(*g*) 1 And. 157.

[of these Acts was soon, indeed, repealed by statute 1 Henry VIII. c. 6 ; but the court of Star-Chamber continued in high vigour, and daily increasing its authority; for more than a century longer, till finally abolished by statute 16 Car. I. c. 10.

Upon this dissolution, the old common law authority of the Court of King's Bench, as the *custos morum* of the nation (*h*), being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in practice (*i*). And it is observable, that in the same Act of Parliament which abolished the court of Star-Chamber, a conviction by information is expressly reckoned up as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute (*k*). It is true, Sir Matthew Hale, who presided in this court soon after the time of such revival, is said to have been no friend to this method of prosecution (*l*): and if so, the reason of such his dislike was probably the ill use which the master of the Crown Office then made of his authority, by permitting the subject to be harassed with vexatious informations whenever applied to by any malicious or revengeful prosecutor; rather than his doubt of their legality, or propriety upon urgent occasions (*m*). For the power of filing informations, without any control, then resided in the breast of the master; and, being filed in the name of the Crown, they subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them in the time preceding the Revolution, occasioned a struggle, soon ~~int~~ the accession of King William, to procure a declaration of their illegality by the judgment of the Court of King's Bench (*n*). But Sir John Holt, who then presided there, and all the judges, were clearly of opinion that this proceeding was

(*h*) See Prynne's case, 5 Mod. 464.

(*i*) Styl. Rep. 217, 245; Styl. Pract. tit. "Information," p. 187, (edit. 1657); Fountain's case, 1 Sid. 152; Dudley's case, 2 Sid. 71.

(*k*) Stat. 16 Car. I, c. 10, s. 6.

(*l*) Prynne's case, 5 Mod. 460.

(*m*) 1 Saund. 301; R. v. Starling, 1 Sid. 174.

(*n*) M. 1 W. & M., Prynne's case, ubi sup.; Comb. 141; Far. 361; R. v. Berchet, 1 Show. 106.

[grounded on the common law, and could not be then impeached. And in a few years afterwards a more temperate remedy was applied in parliament, by statute 4 & 5 W. & M. c. 18, which enacts, that the clerk of the Crown shall not file any information without express direction from the Court of King's Bench; and that every prosecutor permitted to promote such information, shall give security by a recognizance of twenty pounds to prosecute the same with effect, and to pay costs to the defendant, in case he be acquitted thereon, unless the judge who tries the information shall certify that there was reasonable cause for filing it; and, at all events, to pay costs unless the information shall be tried within a year after issue joined (o). But there is a proviso in this Act, that it shall not extend to any other informations than those which are exhibited by the master of the Crown Office; and consequently informations at the suit of the Crown, filed by the attorney-general, are nowise restrained thereby.]

Besides these methods of prosecution, there formerly existed another, which was merely at the suit of the subject, and called an *appeal*, demanding punishment on account of the private injury rather than the public offence. This proceeding, (involving, as we shall see hereafter, a trial by *battel*, instead of by jury,) though leading, in case of conviction, to the same punishment as if the offender had been indicted, might yet be remitted by the private prosecutor; and probably originated, says Blackstone (p), in those times [when a private pecuniary satisfaction, called a *weregild* (q), was constantly paid to the party injured, or his relations, to expiate enormous offences: a custom derived to us, in common with other northern nations, from our ancestors, the antient Germans; among

(o) As to the costs of a criminal information for libel, see Reg. v. Latimer, 20 L. J. (N. S.) Q. B. 129.

(p) 4 Bl. Com. 313.

(q) In our Saxon Laws, particularly those of Athelstan, (Judic. Civ.

Lund. Wilk. 71,) we find the several weregilds for homicide established in progressive order, from the death of the ceorl or peasant to that of the king himself. And see the laws of Hen. 1, c. 12.

[whom, according to Tacitus, "*luitur homicidium certo armentorum ac pecorum numero; recipitque satisfactionem universa domus*"(r).] Appeals were allowed in murder, larceny, rape, arson and mayhem(s). They were not however confined to these cases of private injury, [for it was also antiently permitted to any subject to appeal another subject of high treason, either in the courts of common law or in parliament: or, (for treasons committed beyond the seas,) in the court of the high constable and marshal(t).] But these appeals for treason were, in the opinion of Sir M. Hale, taken away by 5 Edward III. c. 9; 25 Edward III. c. 4; and 1 Henry IV. c. 14(u). And though the remaining appeals continued in force till our own day, yet now, by 59 Geo. III. c. 46, it is enacted, that it shall thenceforth not be lawful for any person to sue an appeal for treason, murder, felony, or other offence; any law or usage to the contrary notwithstanding(x).

An indictment and an information, therefore, are the only methods now extant in the laws of England, for the prosecution of offences(y); of which that by indictment is the most general. [We shall therefore confine our subsequent observations principally to this method; but with some reference, also, as occasion may arise, to the course of proceeding by information.]

(r) De Mor. Germ. c. 21. And in another place, c. 12: "*Delictis, pro modo pœnarum, equorum pecorumque numero convicti mulctantur. Pars mulctæ regi vel civitati; pars ipsi qui vindicatur, vel propinquis ejus, exsolvitur.*" In the same manner, by the Irish Brehon Law, a composition by pecuniary recompence might be made between a murderer and the friends of the deceased. Spenser, St. of Ireland, p. 1513 (edit. Hughes.)

(s) 4 Bl. Com. p. 314. Of the appeal in case of murder, we may remark, that it might be brought either by the wife for the death of her husband; or by the heir male within four degrees of blood, for the

death of his ancestor. (Ibid.)

(t) We are informed by Blackstone (vol. iv. p. 314), that as late as the year 1631 there was a trial by battel awarded in the court of chivalry, on an appeal of treason beyond the seas. This was the case of Donald Lord Rea v. David Ramsey (Rushw. vol. ii. part ii. p. 112).

(u) 1 Hale, P. C. 349.

(x) See Abraham Thornton's case, 1 B. & Ald. 405.

(y) "Prosecution" is here to be understood in the sense which we have latterly had in view (vide sup. pp. 424, 438), and which does not include impeachments (sup. p. 379), or summary convictions (sup. p. 409).

CHAPTER XIX.

OF PROCESS : AND HEREIN, OF CERTIORARI.

[We are next in the fourth place to inquire into the manner of issuing process, after indictment found, to bring in the accused to answer it (*a*). We have hitherto supposed the offender to be in custody,] or else held to bail, [before the finding of the indictment; in which cases, he is immediately after the finding, or as soon as convenience permits, to be arraigned thereon. But if he has fled or secretes himself,] so as to avoid the operation of the warrant; or if no warrant has ever been issued for his arrest, or at least no commitment to take his trial has taken place:—[still an indictment may be preferred against him in his absence: since, were he present, he could not be heard before the grand jury against it. And if it be found, then process must issue to bring him into court,] to appear, or be arraigned. [For the indictment cannot be tried unless he appears;] according to the rule of justice in all cases, [and the express provision of statute 28 Edw. III. c. 3, in capital ones, that no man shall be put to death without being brought to answer by due process of law.]

In general, the process on an indictment is by writ of *capias*, where the person charged is not in custody, and in cases not otherwise provided for by statute (*b*). In misdemeanors it is, also, the practice upon an indictment found during the assizes or sessions, to issue a *bench warrant*, signed by a judge or two justices of the peace, to appre-

(*a*) Vide sup. p. 424. As to the term *process*, vide sup. vol. III. p. 583.

(*b*) 25 Edw. 3, c. 14; 2 Hale, P. C. 195; R. v. Yandell, 4 T. R. 521; 1 Chit. Cr. 339.

hend the defendant(c). And whenever any person is charged with any offence, (not being treason or felony,) for which he may be prosecuted by indictment, or information, in the Court of Queen's Bench;—and it shall be made to appear to any judge of that court, by affidavit or by certificate, that an indictment has been found, or information filed, in such court, against the party, for such offence;—it is made lawful by 48 Geo. III. c. 58, s. 1, for such judge to issue his warrant to bring the party before him, in order to his being bound, with sufficient sureties, to appear and answer the indictment or information(d). But process on *any* indictment found, may now, under the provisions of a later statute, be by warrant from justices of the peace, instead of suing out a *capias*, or bench warrant, or proceeding under the provisions of the Act of Geo. III. For by 11 & 12 Vict. c. 42, s. 3, it is enacted, that where an indictment shall have been found for any indictable offence, in any court of oyer and terminer, or general gaol delivery, or general or quarter sessions of the peace, against any person then at large,—a certificate shall be granted by the proper officer to the prosecutor, of such indictment having been found; and upon production of such certificate to any justice, or justices, of the peace for the place where the offence is alleged in the indictment to have been committed, or in which the person indicted is or is suspected to be, such justice or justices shall issue a warrant to apprehend such person and cause him to be brought up to be dealt with according to law: and, upon its being proved that he is the same person as named in the indictment, shall, without further inquiry, commit him for trial, or admit him to bail. Or if the person against whom the indictment is found, shall be confined in any gaol or prison for any other offence,—then, upon its being proved that he is the same person as named in the indictment, such justice or justices shall issue their warrant to the gaoler, command-

(c) 1 Chit. Cr. L. 339.

(d) 48 Geo. 3, c. 58, s. 1.

ing him to detain such prisoner in custody, until by writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the indictment, or until he shall be otherwise discharged by due course of law (*e*).

Supposing, however, the defendant not to be found, so that his apprehension cannot be effected by any of the above means,—he is then liable, on his non-appearance to the indictment, to be *outlawed* (*f*). The first process for this purpose, in case of misdemeanor, is by [a writ of *venire facias*, which is in the nature of a summons, to cause the party to appear; and if by the return to such *venire*, it appears that the party hath lands in the county whereby he may be distrained, then a distress infinite shall be issued from time to time till he appears. But if the sheriff returns that he has no lands in his bailiwick, then upon his non-appearance, a writ of *capias* shall issue; and if he cannot be taken upon the first, a second and a third shall issue, called an *alias* and a *pluries capias*.] But on indictments for treason and felony, the course is more summary, and a *capias* is the first process. [After the several writs have issued in a regular number,—according to the nature of the respective crimes,—without any effect, the offender shall be put in the *exigent*, in order to his outlawry; that is, he shall be exacted (proclaimed, or required to surrender), at five county courts;] and a writ of proclamation shall also be issued (*g*): [and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is

(*e*) In the particular case of a prisoner, ordered by the Queen's Bench to be tried at the Central Criminal Court, under the provisions of 19 & 20 Vict. c. 16, the gaoler is, by sect. 5 of that Act, to cause the prisoner, with his commitment and detainer, to be removed to Newgate without *habeas corpus* or other writ.

(*f*) Outlawry does not lie against

a corporation, or a parish, or a hundred; nor against a peer, except for treason, felony, or breach of the peace; nor against an infant under fourteen. (1 Chit. Cr. L. 348.) In case of outlawry of a woman, she is said to be *waived*.

(*g*) 4 & 5 W. & M. c. 22, made perpetual by 7 & 8 Will. 3, c. 36, s. 4.

[adjudged to be *outlawed*, or put out of the protection of the law ; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise,] and his property is forfeited to the Crown (*h*). [An outlawry for treason or felony, amounts to a conviction and attainder of the offence, as much as if the offender had been found guilty by his country (*i*). His life is, however, still under the protection of the law, so that though antiently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head, like a wolf, by any one that should meet him (*k*);—because having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him;—yet now, to avoid such inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully; but in so doing is guilty of murder (*l*), unless it happens in the endeavour to apprehend him (*m*): for any person may arrest an outlaw on a criminal prosecution,—either of his own head, or by writ or warrant of *capias utlagatum*,—in order] to bring him in to be dealt with according to law. But an outlawry may be frequently reversed by plea, or by proceedings in error, according to the nature of the case (*n*). In the case of felony, however, the defendant must for this purpose render himself into custody (*o*); and may then take any technical objection to the regularity of the process; which, if allowed, will have the effect of reversing the outlawry, and enable the party accused to plead and defend himself against the indictment (*p*). In one instance, indeed, though the outlawry be regular, its consequences may be avoided: for by 5 & 6 Edw. VI. c. 11, (which

(*h*) A defendant in a civil action is also liable, *after judgment*, to be outlawed, supposing him to abscond leaving the judgment debt unpaid; [vide sup. vol. III. p. 589, n. (*s*).]

(*i*) 2 Hale, P. C. 205.

(*k*) Mirr. c. 4, §. 4; Co. Litt. 128.

(*l*) 1 Hale, P. C. 497.

(*m*) Bracton, l. 3, tr. 3, c. 11.

(*n*) In a modern case, outlawry on error was reversed, after the lapse of 116 years, for want of due proclamations having been made. (Tynte v. Reginam, 7 Q. B. 216.)

(*o*) Solomon v. Graham, 5 Ell. & Bl. 320.

(*p*) Chit. Cr. L. 368, 369; 4 Bl. Com. 320.

permits outlawry for treason, to be awarded against persons residing abroad,)—if a person so outlawed shall, within one year, yield himself to the chief justice, and offer to traverse the indictment, he shall be admitted so to do; and, being acquitted of the indictment, shall be discharged of the outlawry.

[Thus much for process to bring in the offender after indictment found; during which stage of the prosecution it is, that writs of *certiorari facias* are usually had, though they may be had at any time before trial (*q*);]—or, as it seems, at any time before judgment is given, and even afterwards, where error does not lie (*r*);—[to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction, into the Court of Queen's Bench. Which is the sovereign ordinary court of justice in causes criminal;] and has consequently the power of issuing this writ to any court of rank subordinate to its own in causes of this description, unless the *certiorari* be taken away by the express words of some Act of Parliament (*s*). A *certiorari* is frequently granted [for one of these four purposes: either, 1, to consider and determine the validity of indictments, and the proceedings thereon, and to quash or confirm them as there is cause; or, 2, where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed in order to have the person against whom it is found, tried *at bar*, or before the justices of *nisi prius* (*t*),] according to the course of a civil action (*u*); or, 3, [it is so removed in order to plead the royal pardon there; or, 4, to

(*q*) As to *certiorari* in civil proceedings, vide sup. p. 29.

(*r*) 1 Chit. Cr. L. 380.

(*s*) Vide sup. p. 399.

(*t*) See, however, the provision of 19 & 20 Vict. c. 16, post, pp. 471, 472.

(*u*) 14 Hen. 6, c. 1; 6 Hen. 8, c. 6; 4 Rep. 43; 2 Hale, P. C. 41; et vide sup. p. 387. By 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, the judg-

ment in such cases, may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken; and the judgment shall be indorsed on the record, and afterwards entered on the record in court; and it shall be lawful for the judge either to issue an immediate order for execution, or to respite the execution, &c.

[issue process of outlawry against the offender, in those counties or places where the process of the inferior courts will not reach him (*x*). Such writ of *certiorari*, when issued and delivered to the inferior court, for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court; and makes all subsequent proceedings therein entirely erroneous and illegal,] unless the Court of Queen's Bench remands the record to the court below, to be there tried and determined. [A *certiorari* may be granted at the instance of either the prosecutor or the defendant;] and the former was once entitled to demand it as a matter of right, though the application of the latter has always been dependent on the discretion of the court (*y*). But now, by 5 & 6 Will. IV. c. 33, and 16 & 17 Vict. c. 30, s. 5, no *certiorari* shall issue at the instance of the prosecutor, or of any other person (except the attorney-general), without motion first made in the Court of Queen's Bench, or before some judge of that court, and leave obtained, in the same manner as where application is made on the part of the defendant: and moreover, before the allowance of any writ of *certiorari*, the party on whose behalf it is applied for, must enter into a recognizance before a judge of the Queen's Bench or justice of the peace, in such sum and with such sureties as the court or a judge may direct, and with such conditions as are contained in the previous statutes 5 & 6 W. & M. c. 11, and 8 & 9 Will. III. c. 33, passed in relation to the same subject (*z*).

(*x*) 2 Hale, P. C. 210.

(*y*) 4 Bl. Com. 321. In the exercise of this discretion, a *certiorari* has been seldom granted to remove indictments from the justices of gaol delivery; or after issue found, or confession of the fact, in any of the courts below. (See Hawk. P. C. b. 2, c. 27, s. 27; *R. v. Gwynne*, Burr. 749; *R. v. Kingston*, Cowp. 283; *R. v. Harrison*, 1 Chit. Rep. 571.)

(*z*) By 5 & 6 Will. 4, c. 33, a recognizance was required only where the writ was obtained on the part of the defendant. But by 16 & 17 Vict. c. 30, s. 5, it is also required from the prosecutor; and this last statute provides, moreover, for the payment of the costs incurred subsequent to the removal, either by the defendant or the prosecutor, according to the ultimate issue of the proceedings.

And by 16 & 17 Vict. c. 30, s. 4, reciting that by reason of the establishment of a court of criminal appeal, the removal of indictments by writ of *certiorari* is seldom necessary for the decision of questions of law, it is enacted, that no indictments, except against bodies corporate not authorized to appear by attorney in the court in which the indictment is preferred, shall so be removed into the Court of Queen's Bench, or into the Central Criminal Court, either at the instance of the prosecutor or of the defendant, (other than the attorney-general acting on behalf of the Crown,)—unless it be made to appear to the court from which the writ is to issue, by the party applying for the same, that a fair and impartial trial of the case cannot be had in the court below; or that some question of law of more than usual difficulty and importance is likely to arise upon the trial; or that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for the satisfactory trial of the same.

Another Act of recent date (19 & 20 Vict. c. 16) with regard to the trial of offences, the indictment or inquisition for which has been removed by *certiorari* into the Court of Queen's Bench,—contains provisions, of which some notice is proper in this place. 1. Whenever any indictment or inquisition for any felony or misdemeanor committed or supposed to have been committed in a place *out of the jurisdiction* of the Central Criminal Court, has been so removed, the Court of Queen's Bench (or a judge thereof in vacation) is empowered to order the trial thereof to be at the Central Criminal Court,—if it shall appear expedient to the ends of justice that such course should be taken (a). 2. Wherever any person shall have been

As to the terms on which a *certiorari* will be granted, see *The Queen v. Jewell*, 7 Ell. & Bl. 140. No recognizance on removal is required from the prosecutor, in the case of an indictment found at quarter sessions

against a corporation. (See *The Queen v. Manchester*, ib. 463.)

(a) 19 & 20 Vict. c. 16, s. 1. By sect. 2, on notice of such order, the indictment or inquisition is to be transmitted, by the proper officer of

committed or held to bail for any such felony or misdemeanour, the Court of Queen's Bench, or judge in vacation, if it shall appear expedient to the ends of justice that the person charged should be tried at the Central Criminal Court, may make an order to that effect (*b*); and thereupon a writ of *certiorari* shall be issued to the justices of oyer and terminer, or of the peace, or coroner, (as the case may require,) commanding them to certify and return to that Court any indictment or inquisition which is then pending or shall thereafter be found against such person (*c*). 3. Wherever any *certiorari* shall be delivered to any court for the purpose of removing any indictment or inquisition therefrom, any person charged by such indictment or inquisition who shall then be in prison, shall not be discharged by such court, but shall remain there till discharged by due course of law (*d*).

[At this stage of the proceeding also—viz., after indictment found, and before arraignment—it is, that indictments found by the grand jury against a peer must, in consequence of a writ of *certiorari*, be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain (*e*). And also, that in places of exclusive jurisdiction, as the two universities, indictments must be delivered up, on challenge and claim of conusance, to the courts therein established by charter,

the Queen's Bench, to the proper officer of the Central Criminal Court.

(*b*) By 25 & 26 Vict. c. 65, a similar provision is made in reference to the trial of persons subject to the *Mutiny Act*, who are charged with having committed murder or manslaughter out of the jurisdiction of the Central Criminal Court, on persons subject to that Act.

(*c*) Sect. 3. By sect. 4, the justice, coroner, clerk of the peace or of assize, or other person having the custody of the indictment or inquisition, is to transmit any recogni-

zances, depositions, examinations, or informations relating to the offence charged, which shall be in his possession, to the proper officer of the Central Criminal Court.

(*d*) Sect. 11. See ss. 8, 9, 10, as to the recognizances required, (in cases of orders made, or writs of *certiorari* issued under this Act,) from the person charged, or the prosecutor, or witnesses, to take their trial, prosecute or give evidence, (as the case may require,) at the Central Criminal Court.

(*e*) Vide sup. pp. 382, 383.

[and confirmed by Act of Parliament, to be therein ~~respec-~~ respectively tried and determined (*f*).]

Of process upon *informations*, not much requires to be said. In general the course of proceeding is similar to that upon indictments: but the first process is by writ of *subpæna* instead of *venire*; and if the defendant does not appear on this, a *capias* is awarded (*g*). Supposing it to be necessary, however, to proceed to outlawry, the first process is by *venire facias*, as in the case of an outlawry upon an indictment for a misdemeanor, and not by *subpæna* (*h*).

(*f*) Vide sup. p. 405 et seq.

(*h*) 1 Chit. Cr. L. 866.

(*g*) 1 Chit. Cr. L. 865.

CHAPTER XX.

OF ARRAIGNMENT AND ITS INCIDENTS.

THE appearance of the offender, (enforced by the methods pointed out in the last chapter, unless he appears voluntarily, or is already in custody,) must, in general, be in *person*. But in indictments or informations in the Court of Queen's Bench, for misdemeanors, an appearance *by attorney* is allowed (*a*). And in misdemeanors generally, wherever the proceedings are instituted, the trial of the defendant, after he has once appeared, is permitted to take place in his absence (*b*). Immediately on the appearance to an indictment, the offender is to be [*arraigned* thereon; which we have considered as the fifth stage of criminal prosecution (*c*).

To arraign is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment (*d*). The prisoner is to be called to the bar by his name; and it is laid down in our antient books (*e*), that though, under an indictment of the highest

(*a*) By 19 & 20 Vict. c. 16, s. 6, it is provided that on application to the Queen's Bench for an order, that a person charged with any offence committed, or supposed to be committed, out of the jurisdiction of the Central Criminal Court, shall nevertheless be there tried, — it shall not be necessary for such person to be brought or appear in person before the Court of Queen's Bench or judge to whom the application is made.

(*b*) 4 Bl. Com. 375; 1 Chit. Cr. L. 411.

(*c*) *Vide sup.* p. 424.

(*d*) This word in Latin (says Sir M. Hale, vol. ii. p. 216) is no other than *ad rationem ponere*, (and in French *ad reson*, or abbreviated *a resn*.) that is, "to call to account."

(*e*) Bract. l. 3, De Coron. c. 18, s. 3; Mirr. c. 5, ss. 1, 54; Flet. l. 1, c. 31, s. 1; Brit. c. 5; Staundf. P. C. 78; 3 Inst. 66; Kel. 10; 2 Hale, P. C. 219; Hawk. P. C. b. 2, c. 28, s. 1k

[nature, he must be brought to the bar without irons, or any manner of shackles or bonds: unless there be evident danger of an escape, and then he may be secured with irons. But yet in *Layer's case*, A.D. 1722, a difference was taken between the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar in chains, during the time of his arraignment (*f*).

When he is brought to the bar,] in case of treason or felony, [he is called upon by name to hold up his hand (*g*); which, though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand *constat de personâ*; and he owns himself to be of that name by which he is called (*h*). However, it is not an indispensable ceremony; for being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well; therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient (*i*).

Then the indictment is to be read to him distinctly in the English tongue; which was law even while all other proceedings were in Latin; that he may fully understand his charge. After which, it is to be demanded of him, whether he be guilty of the crime whereof he stands indicted, or not guilty.]

When a criminal is arraigned [he either *stands mute* or *confesses the fact*; which circumstances we may call *incidents* to the arraignment; or else he *pleads* to the indictment; which is to be considered as the next stage of the

(*f*) *State Tr.* iv. 230. And see *Hawk. P. C.* b. 2, c. 28, s. 1, n. (2); *Waite's case*, 1 *Leach*, C. C. 36.

(*g*) By 19 & 20 *Vict. c.* 16, s. 7, it is provided, that whenever any indictment or inquisition shall have been transmitted or removed to the Central Criminal Court under the provisions of that Act, the person

charged shall be arraigned in that court in the same manner in all respects as if the offence had been actually committed within the jurisdiction of the court, and the indictment or inquisition had been originally returned there.

(*h*) 2 *Hale*, P. C. 219.

(*i*) *R. v. Ratcliffe*, 1 *W. Bl.* 3.

[proceedings. But, first, let us observe these incidents to the arraignment—of standing mute, or confession.

I. Regularly a prisoner is said to stand mute when, being arraigned for treason or felony, he either, 1, makes no answer at all; or, 2, answers foreign to the purpose, or with such matter as is not allowable, and will not answer otherwise (*j*).] In such case the rule of the antient law was, that a jury was to be impanelled to inquire whether the prisoner stood obstinately mute, or was dumb *ex visitatione Dei*. If the latter appeared to be the case, the judges were to proceed to the trial, and examine all points as if he had pleaded not guilty (*k*). But if found to be obstinately mute, then, in treason, it was held that standing mute was equivalent to conviction; and the law was the same as to all misdemeanors. But upon indictment for any other felony, the prisoner, after *trinu admonitio*, and a respite of a few hours, was subject to the barbarous sentence of *peine forte et dure* (*l*); viz. [to be remanded to prison and put into a low dark chamber, and there laid on his back on the bare floor naked, unless where decency forbade; that

(*j*) He was also formerly considered as standing mute, if, upon pleading not guilty, he at the same time refused to put himself upon the country, that is, refer the matter to trial by jury. (2 Hale, P. C. 316; 4 Bl. Com. 324, 340.) But now, by statute 7 & 8 Geo. 4, c. 28, s. 1, he shall by the plea of not guilty, without any further form, be deemed to have put himself upon his country, for trial; and the court shall order a jury for the trial of such person accordingly.

(*k*) 4 Bl. Com. 324; Hawk. P. C. b. 2, c. 30, s. 7.

(*l*) Blackstone (vol. iv. p. 327) remarks on this punishment, that it has been doubted whether it subsisted at the common law, or was

introduced in consequence of the statute Westminster the first. He inclines to this latter opinion, and cites 2 Inst. 179; 2 Hale, P. C. 322; Hawk. P. C. b. 2, c. 30, s. 16; Staundf. P. C. 149; Barr. 82; Emlyn on 2 Hale, P. C. 322, and Year Book, 8 Hen. 4, c. 2. By these two last authorities, it would appear that at common law, the standing mute in felony (as well as in treason and misdemeanors) was a confession of the charge. As to *peine forte et dure*, much information will be found in Reeves's Hist. Eng. L. vol. ii. p. 134; vol. iii. pp. 133, 250, 418. That author thinks it was introduced sometime between the fifth year of Henry the third, and the third year of Edward the first.

[there should be placed upon his body as great a weight of iron as he could bare, and more: that he should have no sustenance, save only on the first day three morsels of the worst bread, and on the second day three draughts of standing water that should be nearest to the prison door; and that in this situation such should be alternately his daily diet, *till he died*; or, as antiently the judgment ran, *till he answered (m).*]

Afterwards, however, it was provided by 12 Geo. III. c. 20, that standing mute in felonies should be equivalent to a conviction; and now by 7 & 8 Geo. IV. c. 28, s. 2, it is enacted, that if any person, being arraigned upon, or charged with, any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or informa-

(m) 4 Bl. Com. 327; Britt. cc. 4 and 22; Flet. l. 1, c. 34, s. 33; Hawk. P. C. b. 2, c. 30, s. 16. Blackstone (vol. iv. p. 326) remarks upon this strange proceeding, that it is a practice of a different nature from the *rack*, or *question*, to extort a confession from criminals,—*this* having been only used to compel a man to put himself upon his trial, *that* being a species of trial itself. As to the rack, he says that “it is “utterly unknown to the law of “England; though once, when the “Dukes of Exeter and Suffolk, and “other ministers of Henry the “sixth, had laid a design to intro- “duce the civil law into this king- “dom as the rule of government; “for the beginning thereof, they “erected a rack for torture; which “was called in derision the Duke “of Exeter’s Daughter, and still “remains in the Tower of London “(3 Inst. 35), where it was occa- “sionally used as an engine of “state, not of law, more than once

“in the reign of Queen Elizabeth. “But when upon the assassination “of Villiers, Duke of Buckingham, “by Felton, it was proposed, in the “Privy Council, to put the assassin “to the rack, in order to discover “his accomplices, the judges (being “consulted) declared unanimously, “to their own honour and the “honour of the English law, that “no such proceeding was allowable “by the laws of England.” Mr. Hallam observes, that though it be most certain that the English law never recognized the use of torture, yet there were many instances of its employment in the reign of Elizabeth and James; and, among others, in the case of the Gunpowder Plot. He says, indeed, that in the latter part of the reign of Elizabeth, “the “rack seldom stood idle in the “Tower;” and cites Lingard, (note U,) for a specification of the different kinds of torture used. Hall. Const. Hist. vol. i. p. 201; vol. ii. p. 11.

tion (*n*);—in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of “not guilty” on behalf of such person: and the plea so entered shall have the same force and effect, as if such person had actually pleaded the same (*o*). When there is reason to doubt, however, whether the prisoner is sane, a jury should be charged to inquire whether he is sane or not; which jury may consist of any twelve persons who may happen to be present (*p*); and upon this issue, the question will be whether he has intellect enough to plead, and to comprehend the course of the proceedings. If they find the affirmative, the plea of not guilty may be entered, and the trial will proceed (*q*); but if the negative, the provision of 39 & 40 Geo. III. c. 94, s. 2, is then applicable; by which it is enacted, that insane persons indicted for any offence, and on their arraignment found to be insane by a jury lawfully impanelled for that purpose, so that they cannot be tried upon the indictment,—shall be ordered by the court to be kept in strict custody till the royal pleasure be known (*r*).

(*n*) In the case where the prisoner is deaf and dumb, he may be communicated with by signs, or the indictment may be shown to him, with the usual questions written on paper. (See *Jones's case*, 1 Leach, 120; *Thompson's case*, 2 Lewin, 137; *R. v. Dyson*, 7 Car. & P. 306; 1 Chit. Cr. L. 417.)

(*o*) This course was taken in *R. v. Bitton*, 6 Car. & P. 306.

(*p*) 1 Chit. Cr. L. 424.

(*q*) There have been several instances in which persons found to be mute by the visitation of God, have been tried, and had sentence passed upon them. (See *Jones's case*, *ubi sup.*; *Steel's case*, 2 Leach, 507.) But in *Blackstone's* time it was a point yet undeter-

mined whether judgment of death could be given against a prisoner who had never pleaded, and could say nothing in arrest of judgment. 4 Bl. Com. 325; 2 Hale, P. C. 317. And see Mr. Christian's notes to *Blackstone*, *ubi sup.*

(*r*) Vide *sup.* p. 111. In several cases the course taken, when the prisoner has stood mute, has been to put *three points* to the jury; first, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of the proceedings. (*R. v. Dyson*, 7 Car. & P. 305; *R. v. Pritchard*, *ibid.* 303.)

II. [The other incident to arraignment, exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession,] at least in capital cases, [out of tenderness to the life of the subject; and will generally advise the prisoner to retract it and plead to the indictment (s).

But there is another species of confession, which we read much of in our antient books, of a far more complicated kind, which is called *approvement*; and that is, when a person, indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded; and appeals or accuses others, his accomplices, of the same crime, in order to obtain his pardon. In this case he is called an *approver*, or prover, *probator*; and the party appealed, or accused, is called the *appellee*. Such approvement can only be in capital offences; and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it; and if he hath no reasonable and legal exceptions to make to the person of the approver,—which indeed are very numerous,—he must put himself upon his trial by the country; and, if found guilty, must suffer the judgment of the law; and the approver shall have his pardon *ex debito justitiæ*. On the other hand, if the appellee be acquitted by the jury, the approver shall receive judgment to be hanged; upon his own confession of the indictment: for the condition of his pardon has failed, viz. the conviction of some other person; and therefore his conviction remains absolute.

But it is purely in the discretion of the court, to permit the approver thus to appeal or not; and, in fact, this course of admitting approvements hath been long disused; for the truth was, as Sir Matthew Hale observes, that more mischief arose to good men by these kinds of approvements, upon false and malicious accusations of despe-

[ratē villains, than benefit to the public by the discovery and conviction of real offenders; and, therefore, in the times when such appeals were more frequently admitted, great strictness and nicety were held therein; though, since their discontinuance, the doctrine of approvements is become a matter of more curiosity than use(*t*).]

It has also been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol,—in cases where it has appeared probable that the evidence would otherwise be insufficient to obtain a conviction,—to hold out a hope to some one of the accomplices, that if he will fairly disclose the whole truth as a witness on the trial, and bring the other offenders to justice, he shall himself escape punishment. Such an accomplice is usually said to be admitted to become *queen's evidence*; but his admission in that capacity, requires the subsequent sanction of the judges of gaol delivery(*u*). Nor will any person in general be admitted as *queen's evidence*, if it appear that he is charged with any other felony than that in question(*x*). The testimony of an accomplice is in all cases, indeed, regarded with just suspicion(*y*); and unless this statement is corroborated in some material part by unimpeachable evidence, the jury are usually advised by the judge to acquit the prisoner(*z*); and if the accomplice, after having confessed the crime, and being admitted as *queen's evidence*, fails in the con-

(*t*) See 2 Hale, P. C. c. 29; Hawk. P. C. b. 2, c. 24.

(*u*) See R. v. Rudd, Cowp. 331.

(*x*) 2 C. & P. 411. See R. v. Lee, R. & R. C. C. R. 361; R. v. Brunton, *ibid.* 454.

(*y*) On this subject see the remarks of Holt, C. J., in Charnock's case, 4 St. Tr. 594.

(*z*) 1 Phil. Ev. 9th edit. 31; Taylor on Evidence, p. 779, 2nd edit. And as to the nature of the confirmation required, see R. v.

Addis, 6 C. & P. 388; R. v. Webb, *ibid.* 595; R. v. Moores, 7 C. & P. 270; R. v. Wilks, *ibid.* 272; Despard's case, 28 How. St. Tr. 488. It is held, however, that the jury may legally convict if they think fit, on the unsupported testimony of an accomplice. 1 Phil. Ev. 30; R. v. Hastings, 7 C. & P. 152; Taylor on Evidence, p. 779, 2nd edit.; R. v. Stubbs, 1 Dearsley's C. C. R. 555.

dition on which he was so received, by refusing to give fair and full information, he is then himself liable to be tried for the offence, and may be convicted on his own confession (*a*).

(*a*) 1 Phil. Ev. 29. Upon a trial at York before Mr. Justice Buller, the accomplice denied in his evidence all that he had before confessed; upon which the prisoner was acquitted. But the judge ordered an indictment to be preferred against the accomplice for the same crime; and on his previous confession, and other circumstances, he was convicted and executed. (Christian's Blackstone.)

CHAPTER XXI.

OF PLEA AND ISSUE.

[WE are now to consider the plea of the prisoner,] or defendant (*a*) ; that is, the [defensive matter alleged by him on his arraignment, if he does not confess or stand mute. This is either—I. A plea to the jurisdiction. II. A demurrer (*b*). III. A plea in abatement. IV. A special plea in bar : or, V. The general issue (*c*).]

(*a*) Vide sup. p. 424. By 19 & 20 Vict. c. 16, s. 6, it is provided, that on application to the Queen's Bench for an order under that Act, that a person charged with any offence committed, or supposed to have been committed, out of the jurisdiction of the Central Criminal Court, shall nevertheless be there tried,—it shall not be necessary for such person to plead any plea to such indictment or inquisition in the Queen's Bench, when the order applied for is made.

(*b*) See Bl. Com. vol. iv. p. 332. It has not been thought material to alter this arrangement of Blackstone's ; but, in strictness, a *demurrer* is not a *plea*. It is rather an exception taken to the indictment or information in point of law, as a reason why the defendant should not be compelled to plead to its allegations. As to demurrer in civil cases (to which this is equivalent), vide sup. vol. III. p. 596.

(*c*) Besides these pleas, there

were formerly the *declinatory* pleas of *sanctuary*, and of *benefit of clergy*. (See 2 Hale, P. C. 236.) As to the former, we may remark, that the law of sanctuary was introduced and continued during the superstitious veneration paid to consecrated ground, in the time of popery ; and existed in England from a period soon after the conversion of the Saxons to Christianity. (See Reeves's Hist. Eng. Law, vol. i. p. 19 ; vol. iii. p. 137 ; vol. iv. pp. 182, 314, 320.) The statement of this law by Blackstone (vol. iv. p. 332) is as follows :—“ If “ a person accused of any crime, “ except treason and sacrilege, had “ fled to any church or churchyard, “ and within forty days after, went “ in sack-cloth and confessed him- “ self guilty before the coroner ; and “ declared all the particular circum- “ stances of the offence, and took the “ oath in that case provided, viz. that “ he abjured the realm, and would “ depart from thence forthwith at “ the port which should be assigned

I. [A plea to the jurisdiction, is where an indictment is taken before a court that hath no cognizance of the offence (*d*): as if a man be indicted for a rape at the sheriff's tourn; or for treason at the quarter sessions (*e*). In these or similar cases, he may except to the jurisdiction of the court, without answering at all to the crime alleged (*f*).] But a formal plea to the jurisdiction is of rare occurrence: it being competent to a defendant to bring forward this sort of objection, in some cases by way of demurrer, or by motion in arrest of judgment; in others under the general issue (*g*).

"him, and would never return without leave from the king; he, by this means saved his life, if he observed the conditions of the oath, by going with a cross in his hand, and with all convenient speed, to the port assigned, and embarking. For if during this forty days' privilege of sanctuary, or on his road to the sea side, he was apprehended and arraigned in any court for this felony, he might plead the privilege of sanctuary, and had a right to be remanded if taken out against his will."—(Mirr. c. 1, s. 13; Hawk. P. C. b. 2, c. 32.) But by this abjuration his blood was attainted, and he forfeited all his goods and chattels. (Hawk. P. C. b. 2, c. 9, s. 44.) The immunity of these sanctuaries,—which consisted not only of churches and churchyards, but of certain other places in various parts of this kingdom, viz. in Westminster, Wells, Norwich, York, &c.—was very much abridged by the statutes 26 Hen. 8, c. 13; 27 Hen. 8, c. 19, and 39 Hen. 8, c. 12. And now by the statute 21 Jac. 1, c. 28, all privilege of sanctuary, and abjuration consequent thereupon is utterly taken away and abolished.* And

the opposing of any process in pretended privileged places is made penal, by the statutes 8 & 9 Will. 3, c. 27; 9 Geo. 1, c. 28; 11 Geo. 1, c. 22; 1 Geo. 4, c. 116; as to which, vide sup. p. 306.

As to *benefit of clergy*, vide post, p. 524, n. (*e*). We shall only remark here, that though it might be the subject of a plea, it was not usually brought forward in that shape, but in arrest of judgment.

(*d*) By 19 & 20 Vict. c. 16, s. 7, wherever any indictment or inquisition shall have been transmitted or removed to the Central Criminal Court, under the provisions of that Act—any person charged with any offence thereby shall plead to such indictment or inquisition, and shall be tried in the said Central Criminal Court, in the same manner in all respects as if such offence had been actually committed within the jurisdiction of that court, and the indictment or inquisition had been originally there presented or returned. See also 25 & 26 Vict. c. 65, s. 7.

(*e*) Vide sup. p. 398.

(*f*) 2 Hale, P. C. 256.

(*g*) *R. v. Fearnley*, 1 T. R. 316; *R. v. Johnson*, 6 East, 583.

II. [A demurrer. This is incident to criminal cases as well as civil,] when the fact as alleged is allowed to be true, but the defendant takes exception, in point of law, to the sufficiency of the indictment or information, on the face of it: as if he insists that the fact as stated is no felony, treason, or whatever the crime is alleged to be. [Thus, for instance, if a man be indicted for *feloniously* stealing a greyhound:] which is an animal not the subject of larceny at common law^(h), and the stealing whereof is not made felony by any statute, but only a misdemeanor⁽ⁱ⁾; —[in this case, the party indicted may demur to the indictment, denying it to be felony, though he confesses the act of taking the animal.] If on demurrer to an indictment, the point of law be adjudged *for* the defendant, and the objection be on matter of substance, the judgment is that he be dismissed and discharged: if the objection be merely formal, then that the indictment be quashed^(k). On the other hand, if the judgment be *against* the defendant, and the offence for which he is indicted be a misdemeanor or a felony, but not capital—such judgment, according to the better authorities, is final^(l). And even in capital cases, some have held that if, on demurrer, the point of law be adjudged against the defendant, he shall have judgment and execution as if convicted by verdict^(m). But by modern authorities it has been held, that he shall in such cases be allowed to plead the general issue, “not guilty,” after a demurrer determined against him⁽ⁿ⁾; a doctrine which appeared to Blackstone also [the more reasonable, because it is clear that if the prisoner freely discovers the fact in court, and refers it

(h) Vide sup. p. 200.

(i) Vide sup. vol. II. p. 8.

(k) 1 Chit. Cr. L. 443, 444; Andr. 147.

(l) Hawk. P. C. b. 2, c. 31, s. 7; R. v. J. Taylor, 3 B. & C. 502; Reg. v. Faderman, 1 Den. C. C. 565.

(m) Bro. Peremptory, 86; 3 Staundf.

150, C.; 2 Inst. 178; 2 Hale, P. C. 257.

(n) The defendant has been also permitted (both in capital and in other felonies), to demur and plead not guilty at the same time. (R. v. Phelps, 1 C. & M. 181; R. v. Adams, ib. 295; R. v. Purchase, ib. 617.)

[to the opinion of the court whether it be felony or no, and upon the fact thus shown it appears to be felony,—the court will not record the confession, but admit him afterwards to plead not guilty (*o*). And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading;] and it must be presumed that [the law will not suffer him by such niceties to lose his life.] Owing to this uncertainty, however, as to the proper form of judgment, and the power that has been allowed to defendants of urging all objections upon the general issue, or by motion in arrest of judgment, as well as upon demurrer, demurrers to indictments have been seldom used. But objections at this early stage have been not unfrequently taken in another and more summary shape, viz. by a motion on the part of the prisoner to *quash* the indictment (*p*); a course which, in a very clear and obvious case, the practice of the courts allow (*q*). And the power of bringing forward objections at any later period, is now materially limited; it being provided by 14 & 15 Vict. c. 100 (*r*), that all objections for *formal* defects shall be taken by demurrer or motion to quash the indictment, and not afterwards; and shall be amendable forthwith.

III. A plea in abatement, or dilatory plea, is founded on some matter of fact extraneous to the indictment, tending to show that it is defective in point of form; and has principally occurred in the case of a *misnomer*; i. e. a wrong name, or a false addition to the defendant,—as where James Allen, gentleman, has been indicted by the name of John Allen, esquire, and has pleaded that he has the name of James and not of John, and that he is a gentle-

(*o*) 4 Bl. Com. 334. And see Hawk. P. C. b. 2, c. 31, ss. 5, 6, and 2 Hale, P. C. 225.

(*p*) The court may also quash the indictment on its own view. (See

R. v. Wilson, 6 Q. B. 620; R. v. Dunn, Ry. & M. P. C. 146.)

(*q*) 1 Chit. Cr. L. 299.

(*r*) 14 & 15 Vict. c. 100, ss. 24, 25. And see 7 Geo. 4, c. 64, s. 20.

man and not an esquire. But in the case of misnomer, no advantage at all now accrues to the defendant by a plea in abatement; for by 7 Geo. IV. c. 64, s. 19, no indictment or information shall be abated by reason of any dilatory plea of misnomer: but if the court shall be satisfied, by affidavit or otherwise, of the truth of such plea, it shall forthwith cause the indictment or information to be amended according to the truth; and shall call upon the party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded. And by 14 & 15 Vict. c. 100, s. 24, no indictment shall be held insufficient for want of, or imperfection in, the addition of any defendant. Let us therefore next consider a more substantial kind of plea, viz.

IV. [A special plea in bar; which goes to the merits of the indictment,] and gives a reason why the prisoner ought to be discharged from the prosecution. These are principally of four kinds (*s*). A former acquittal; a former conviction; a former attainder; or a pardon.

1. The plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy more than once, for the same offence (*t*): [and hence it is allowed as a consequence, that when a man is once fairly found not guilty upon an indictment or other prosecution, before any court having a competent jurisdiction of the offence (*u*), he may plead such acquittal in bar of any sub-

(*s*) In the particular case where a parish or county is indicted for not repairing a road or a bridge respectively, another kind of special plea in bar occurs; for the parish or county may respectively plead, in discharge of their own presumptive liability, that some other party is liable to a special obligation to repair. As to repairs of highways, &c. vide sup. vol. III. p. 242 et seq.

(*t*) "*Jeopardy of his life*," is the expression of Blackstone (vol. iv. p. 335). The maxim, however, is not confined to capital felonies, but extends even to misdemeanors. See an instance of *autrefois acquit* pleaded in a case of misdemeanor, *R. v. Taylor*, 3 B. & C. 502.

(*u*) *Beak v. Thyrwhit*, 3 Mod. 194; *Hawky. P. C. b. 2, c. 35, s. 10*.

[sequent accusation for the same crime.] This however applies only to an acquittal by verdict of a petit jury (*x*): and therefore if a man be committed to take his trial for a crime at some particular assizes or sessions whereat no bill is preferred against him, he is still liable to be indicted for such crime; or if the bill against him be thrown out by the grand jury, he is liable to be indicted again (*y*). The doctrine applies, also, only to the case where the first indictment was not substantially erroneous. For if it were, the former prosecution is no bar, because the defendant was never legally in jeopardy (*z*). It is also to be observed, that, in general, the crime of which the defendant was before acquitted, must be identical with that with which he now stands charged: but upon this point, distinctions of much nicety arise. Thus if a man be acquitted upon an indictment of murder, he may not only plead *autrefois acquit* to a subsequent indictment for the murder, but even to an indictment for the manslaughter of the same person; or *à converso*, if he be indicted for manslaughter, and be acquitted, he shall not be indicted for the same death, as murder; for the two cases differ only in the degree of guilt, and the fact is the same (*a*). So if he be indicted for a murder, as committed on a certain day, and be afterwards indicted again for the murder of the same person on a different day, he may plead *autrefois acquit*, and aver it to be the same felony; for the day is not material (*b*). On the other hand, if a man be indicted as accessory, and acquitted, that acquittal will be

(*x*) 2 Hale, P. C. 243, 246; Hawk. P. C. b. 2, c. 35, s. 6.

(*y*) 1 Chit. Cr. L. 458; 2 Hale, P. C. ubi supra. But the grand jury cannot, after throwing out the bill, find another bill against him for the same offence, at the same assizes or sessions. (*R. v. Humphreys*, Carr. & M. 601; *R. v. Austin*, 4 Cox, C. C. 386.)

(*z*) 4 Rep. 45, a; 2 Hale, P. C. 393. See *The Queen v. Green*, 26

L. J. (M. C.) 17.

(*a*) 2 Hale, P. C. 246.

(*b*) 2 Hale, P. C. 244. Hale adds, "Besides the death is of a person certain, who can be but once killed." The same law, however, as he himself proceeds to observe, "applies to an indictment of robbery;" though it is possible that several robberies may be committed on several days.

no bar to an indictment as principal, nor *à converso*. It was formerly doubted, indeed, whether he might not plead an acquittal as principal, to a second indictment charging him as accessory before the fact; but the general doctrine is now held to apply to that case also (*d*). For though the offence may in some respects be considered as the same, the prisoner may be convicted under the second indictment, upon facts which would not have warranted his conviction under the first (*e*). We may conclude our remarks on the subject of the plea of *autrefois acquit*, by observing that the defendant, in adopting this plea, usually also pleads at the same time the general issue, denying the felony charged; and if the former plea is found against him, the trial proceeds upon the second (*f*).

2. The plea of *autrefois convict*, or a former conviction (whether judgment was ever given or not) for the same identical crime, [is a good plea in bar to an indictment: and this depends upon the same principle as the former, that no man ought to be twice brought into danger for one and the same crime: and is governed in general by the same rules (*g*).] And if the former conviction was for a capital offence, and followed by an actual judgment of death, the defendant may resort to—

3. [The plea of *autrefois attain*, or a former attainder] for the same crime (*h*); which is also a good plea in bar, depending upon the same principle, and governed in general by the same rules, as the plea of *autrefois convict*. It might formerly indeed have been pleaded where a man, after being attainted of one felony, was afterwards indicted

(*d*) Vide sup. p. 129.

(*e*) See Hawk. P. C. b. 2, c. 35, s. 11; 2 Hale, P. C. 244; Fost. 361; R. v. Birchenough, 1 M. C. C. R. 477; R. v. Parry, 7 C. & P. 836.

(*f*) Arch. Cr. L. by Jervis, 9th ed. p. 91; R. v. Sheen, 2 Car. & P. 635. As to this plea, and also as to that of *autrefois convict*, it is provided by 14 & 15 Vict. c. 100, s. 28, that "it shall be sufficient for the defend-

"ant to state that he has been law-
"fully acquitted or convicted (as
"the case may be) of the said
"offence charged in the indictment."
And see as to the plea of *autrefois acquit*, Queen v. Bird, 20 L. J. (M. C.) 70.

(*g*) Hawk. P. C. b. 2, c. 36, s. 10.

(*h*) As to attainder, vide post, c. xxxiii.

for *another* (*i*); for the prisoner being considered as dead in law by the first attainder, and having therefore already forfeited all that he had, it was considered as [absurd and superfluous to endeavour to attain him a second time.] But now, by 7 & 8 Geo. IV. c. 28, s. 4, it is enacted, that no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment.

4. Lastly, [a *pardon* may be pleaded in bar, as at once destroying the end and purpose of the indictment, by remitting that punishment which the prosecution is calculated to inflict (*j*).] In capital offences, [there is one advantage that attends pleading a pardon in bar, or in arrest of judgment, *before* sentence is past, which gives it by much the preference to pleading it *after* sentence or attainder. This is, that, by stopping the judgment, it stops the attainder; and prevents the corruption of blood,] which follows in certain cases on conviction; and which cannot afterwards be purged except by Act of parliament (*k*). [But as the title of pardons is applicable to other stages of prosecution,]—a pardon being pleadable (according to the period at which it is obtained) not only in bar of the indictment; but, after verdict, in arrest of judgment; or, after judgment, in bar of execution:—the more minute consideration of them shall be reserved, till we have gone through every other title except only that of execution.

[Before we conclude this head of special pleas in bar, it will be necessary to observe, that though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea; and cannot resort to another if that be determined against him (*l*): as if, on an action of

(*i*) 4 Bl. Com. 336; Hawk. P. C. b. 2, c. 36.

(*j*) As to pardons, vide post, c. xxv.

(*k*) 4 Bl. Com. 338.

(*l*) It will be understood that Blackstone is speaking here (vol. iv. p. 338) of the case of a defendant's

first pleading one plea (or several together, as the case may be), and afterwards, on failure of these, attempting to place another on the record: not to the case of his pleading several pleas contemporaneously, and, on failure at the trial to esta-

[debt, the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue,] that he “was never indebted as alleged,” as he might at first (*m*)—[for he has made his election what plea to abide by, and it was his own folly to choose a rotten defence;] yet in criminal prosecutions for felonies, that rule is disregarded (*n*). For in such cases, [though a prisoner’s plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court, still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*; and may plead over to the felony the general issue, not guilty (*o*).] For the law allows many pleas by which a prisoner may escape the punishment of felony, but only one plea in consequence whereof it can be inflicted: [viz. on the general issue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury. It remains therefore that we consider—

V. The general issue, or plea of *not guilty*.] This is the proper form, wherever the prisoner means either to deny or to justify the charge in the indictment, and it is to be observed, that in such case there can be no special plea, either in treason or felony. Thus [on an indictment for murder, a man cannot plead that it was in his own defence, against a robber; but he must plead the general issue, not guilty, and give this special matter in evidence. For, (besides that such pleas do in effect amount to the general issue, since, if true, the prisoner is most clearly not guilty,) as the facts in treason are laid to be done *proditoriè*, and in felony, to be done

publish *all* of these, taking the benefit of such as he is able to establish;—which the practice in civil cases permits, vide sup. vol. III. p. 605.

(*m*) As to this plea, vide sup. vol. III. p. 598.

(*n*) *R. v. Gibson*, 8 East, 110.

This is confined, as stated in the text, to felonies. It does not apply to indictments, or informations, for misdemeanors (*R. v. Taylor*, 3 B. & C. 502), being originally established only *in favorem vitæ*.

(*o*) 2 Hale, P. C. 239.

[*felonice*; these charges of a traitorous or felonious intent are the points and very *gist* of the indictment; and must be answered directly by the general negative, not guilty,]—the effect of which is, that on the one hand it puts the prosecutor to the proof of every material fact alleged in the indictment or information; and on the other it entitles the defendant to avail himself of any defensive circumstances, as amply as if he had pleaded them in a specific form. [So that this is, upon all accounts, the most advantageous plea for the prisoner (*p*).]

By the plea of not guilty, the prisoner puts himself upon the trial by jury (*q*); and when the record comes afterwards to be made up,—for the proceedings ought regularly to be *recorded*, according to the analogy of the practice in civil cases (*r*),—the prosecutor on the part of the Crown adds the *similiter* (as it is called), by the words that he “doth the like (*s*).” But even before this formal entry, the *similiter* is supposed to be added by the prosecutor, immediately on the plea of not guilty being pleaded by the defendant (*t*),—which brings the parties

(*p*) 2 Hale, P. C. 258. This plea, as we have seen, the court may order to be entered for the defendant, when he stands mute of malice, &c.; vide sup. pp. 477, 478.

(*q*) The defendant, on pleading not guilty, used formerly to refer the matter expressly to the trial by jury; but by 7 & 8 Geo. 4, c. 28, s. 1, he is now to be deemed to do so (in treason or felony) by simply pleading not guilty.

(*r*) Vide sup. vol. III. p. 616.

(*s*) By 7 & 8 Geo. 4, c. 64, s. 20 no judgment after verdict, shall be stayed or reversed for want of a *similiter*.

(*t*) Other ceremonies were formerly observed,—which involve the true etymology of the word *culprit*.

When the prisoner pleaded not guilty, *non culpabilis*, or *nient culpable*, it was abbreviated on the minutes of the court thus, “*non* (or *nient*) *cul.*,” and the joining of issue thereon by the prosecutor was expressed by the abbreviation “*prit.*,” the precise origin of which latter expression is somewhat doubtful. In course of time, it became the practice for the officer of the court to read aloud these words, without regard to their real meaning (which was beginning to be forgotten, owing to the disuse of law French); and to apply them as an appellation of the prisoner himself; for when a prisoner pleaded not guilty, the officer used to say, “*Culprit*, how wilt thou be tried?” to which the

to issue(*u*). [And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.]

latter usually added, "By God, and the country," meaning by a jury. (See 4 Bl. Com. 339, and note by Christian.) Blackstone also (*ubi sup.*) takes occasion, in reference to this subject, to remark upon another corruption which has taken

place and is still observable in the law French; viz. in the prologue to all our public proclamations, *oyez*, or *hear ye*, which is generally pronounced, most unmeaningly, *oh! yes!*

(*u*) As to the term issue, vide *sup.* vol. III. p. 594.

CHAPTER XXII.

OF TRIAL AND CONVICTION.



[THE several methods of trial and conviction of offenders (*a*), established by the laws of England, were formerly more numerous than at present, through the superstition of our Saxon ancestors; who, like other northern nations, were extremely addicted to divination, a character which Tacitus observes of the antient Germans (*b*). They therefore invented certain methods of purgation or trial, to preserve innocence from the danger of false witnesses; and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless.] To these, though most of them have been long since, and all are now, abolished, some notice seems to be due, on account of their legal and historical associations, and as matter of curiosity,—before we proceed to those existing methods which constitute the proper subject of the chapter.

I. [The most antient species of trial was that by *ordeal* (*c*), which was peculiarly distinguished by the appellation of *judicium Dei*, and sometimes *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party (*d*). This was of two sorts (*e*),

(*a*) Vide sup. p. 424.

(*b*) De Mor. Germ. 10.

(*c*) Wilk. Leges Ang. Sax. LL. Inæ, c. 77. See as to this ordeal, Turn. Angl. Sax. vol. ii. p. 532; Hall. Mid. Ag. vol. ii. p. 466; in which last work an instance is given of a citizen of London undergoing

the ordeal of cold water, in a case of murder, in the reign of Henry the second, and on failure therein being hanged.

(*d*) Vide sup. vol. III. p. 450, n. (*d*).

(*e*) Mirr. c. 3, s. 23.

[either *fire-ordeal*, or *water-ordeal*; the former being confined to persons of higher rank, the latter to the common people (*e*). Both these might be performed by deputy; but the principal was to answer for the success of the trial, the deputy only venturing some corporal pain for hire, or perhaps for friendship (*f*). Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red hot iron, of one, two, or three pounds weight; or else by walking,—bare foot, and blindfold,—over nine red hot plough-shares, laid lengthwise, at unequal distances; and if the party escaped being hurt, he was adjudged innocent: but if it happened otherwise, (as without collusion it usually did,) he was then condemned as guilty. However, by this latter method, queen Emma, the mother of Edward the Confessor, is mentioned to have cleared her character, when suspected of familiarity with Alwyn, Bishop of Winchester (*g*).

Water-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby: or by casting the person suspected into a river or pond of cold water; and, if he floated therein without any action of swimming, it was deemed an evidence of his guilt, but if he sank, he was acquitted. It is easy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity that has been practised, in many countries, to discover witches by casting them into a pool of water, and drowning them to prove their innocence. And in the eastern empire the fire-ordeal was used to the same purpose by the emperor Theodore Lascaris; who, attributing his sickness to magic, caused all those, whom he suspected, to handle the hot iron; thus joining,

(*e*) *Tenetur se purgare is qui accusatur, per Dei judicium; scilicet per calidum ferrum, vel per aquam, pro diversitate conditionis hominum: per ferrum calidum, si fuerit homo liber; per aquam, si fuerit rusticus.*—Glanv. s. 14, c. 1.

(*f*) This is still expressed in that common mode of speech, “of going through fire and water to serve another.”

(*g*) Tho. Rudborne, Hist. Maj. Winton, l. 4, c. 1.

[as has been well remarked, to the most dubious crime in the world the most dubious proof of innocence (*h*).

And indeed this purgation by ordeal, seems to have been very antient, and very universal, in the times of superstitious barbarity. It was known to the antient Greeks; for, in the *Antigone* of Sophocles, a person suspected by Creon of a misdemeanor, declares himself ready “to handle hot iron and to walk over fire,” in order to manifest his innocence (*i*); which, the scholiast tells us, was then a very usual purgation. And Grotius gives us many instances of water-ordeal in Bithynia, Sardinia, and other places (*h*).

One cannot but be astonished at the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended, by an immediate interposition of Providence to save the innocent, whenever it was presumptuously required. And yet in England, so late as King John’s time, we find grants to the bishops and clergy, to use the *judicium ferri, aquæ, et ignis* (*l*). And both in England and Sweden, the clergy presided at this trial; and it was only performed in the churches or in other consecrated grounds: for which Stiernhook gives the reason, “*non defuit illis operæ et laboris pretium; semper enim ab ejusmodi judicio, aliquid lucri sacerdotibus obveniebat* (*m*).” But to give it its due praise, we find the canon law very early declaring against trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, “*cum sit contra præceptum Domini, non tentabis Dominum Deum tuum* (*n*).” Upon this authority,—though the canons themselves were of no validity in England,—it was thought proper to dis-

(*h*) Sp. L. b. 12, c. 5.

(*i*) V. 270.

(*k*) Grot. on Numb. v. 17. And see Mod. Univ. Hist. vii. 266.

(*l*) Spelm. Gloss. 435.

(*m*) De Jure Sueon. l. 1, c. 8.

(*n*) Decret. part 2, caus. 2, qu. 5, dist. 7; Decret. lib. 3, tit. 50, c. 9; and Gloss. *ibid*.

use and abolish this trial entirely in our courts of justice, by an Act of parliament in the third year of Henry the third, according to Sir Edward Coke (*o*); or rather by an order of the king in council (*p*).

II. Another species of purgation,—somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition,—was the *corsned*, or morsel of execration, being a piece of cheese or bread, of about an ounce in weight, which was consecrated with a form of exorcism, desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty; but might turn to health and nourishment if he was innocent (*q*). As the water of jealousy, among the Jews, was, by God's special appointment, to cause the belly to swell, and the thigh to rot, if the woman was guilty of adultery (*r*). This *corsned*, then, was given to the suspected person, who at the same time also received the holy sacrament (*s*); if, indeed, the *corsned* was not (as some have suspected) the sacramental bread itself, till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Our historians assure us, that Godwin, earl of Kent, in the reign of king Edward the Confessor, abjuring the death of the king's brother, at last appealed to his *corsned*, "*per buccellam deglutiendam abjuravit (t)*;" which stuck in his throat and killed him. This custom has been long since gradually abolished; though the remembrance of it still subsists, in

(*o*) 9 Rep. 32. It had been abolished in Denmark above a century before. (Mod. Un. Hist. xxxii. 105.)

(*p*) 1 Rym. Fœd. 228; Spelm. Gloss. 326; 2 Pryn. Rec. Append. 20; Seld. Eadm. fol. 48.

(*q*) Spelm. Gloss. 439.

(*r*) Numb. v.

(*s*) "*Si quis alteri ministrantium accusetur et amicis destitutus sit cum sacramentales non habeat, vadat ad iudicium quod Anglicè dicitur 'corsned,' et fiat sicut Deus velit, nisi super sanctum corpus Domini permittatur ut se purget.*"—Wilk. Leges Ang. Sax. LL. Canut. c. 6.

(*t*) *Ik'zulph.*

[certain phrases of abjuration retained among the common people (*u*).

These two antiquated methods of trial, were principally in use among our Saxon ancestors.] The next,—which though in modern times almost wholly laid aside, yet remained in force in the English law, till its abolition by the 59 Geo. III. c. 46 (*x*),—owed its introduction among us to the princes of the Norman line; and that is—

III. The trial by *battel*, duel, or single combat (*y*); which was another species of presumptuous appeal to Providence, under an expectation that Heaven would unquestionably give the victory, to the innocent or injured party.] This obtained in appeals (*z*), and in approvals (*a*); and also in the civil action called a writ of right (*b*). [The first written injunction of judiciary combats that we meet with, is in the laws of Gundebald, A.D. 501, which are preserved in the Burgundian code; yet it does not seem to have been a local custom of this or that particular tribe, but to have been the common usage of all the northern people from the earliest times (*c*).] In a writ

(*u*) As "I will take the sacrament upon it," "May this morsel be my last," and the like.

(*x*) Vide sup. p. 464.

(*y*) On the subject of trial by *battel*, some valuable information will be found in Hallam's Mid. Ag. vol. i. pp. 277—294.

(*z*) As to appeals, vide sup. p. 463. The last occasion on which trial by *battel* was offered in an appeal, was in Abraham Thornton's case in the year 1818 (1 Barn. & Ad. 405).

(*a*) 2 Hale, P. C. p. 233. As to approvals, vide sup. p. 479.

(*b*) This was one of the real actions now abolished. (Vide sup. vol. III. pp. 507, 511, 608.) The last occasion on which trial by *battel*

in a writ of right was awarded (of which we have an authentic account), was in the 13 Eliz. in the year 1571; and was granted, says Sir Henry Spelman, *non sine magnâ jurisconsultorum perturbatione*. (See Dyer, 301, from whose report it appears that no actual combat took place, the demandants making default.) Blackstone (vol. iii. p. 338) refers, however, to a later trial, which he states was waged in the county palatine of Durham in 1638. (See Cro. Car. 512.)

(*c*) Seld. on Duels, c. 5; et vide Stiern. de Jure Sueon. l. 1, c. 7. Mr. Hallam says (vol. i. p. 278, *in notis*), that it may be met with under the first Merovingian kings in France; and was established by

of right, [when the tenant pleaded the general issue; viz. that he had more right to hold than the demandant to recover;] he might offer to prove it by the body of his champion(*d*): which tender being accepted by the demandant, the champion for the tenant threw down his glove, as a gage or pledge; and was then said to *wage* battel with the champion of the demandant; who by taking up the gage or glove accepted on his part such challenge(*e*). And the battel was thus waged by champions, and not by the parties themselves, in order principally, as it would seem, [that no person might claim an exemption from this trial; as was allowed in criminal cases, where the battel was waged in person(*f*).] A piece of ground was then set out; and the champions were introduced, armed with batons and staves an ell long, and a four-cornered leather target. [In the court military, indeed, they fought with sword and lance, according to Spelman and Rushworth: as likewise, in France, only villeins fought with the buckler and baton; gentlemen, armed at all points. And upon this and other circumstances, Montesquieu hath, with great ingenuity, not only deduced the

the laws of the Alemanni or Swabians, and also of the Lombards; and he cites Baluz. t. 1, p. 80, and Muratori, Script. Rer. Ital. t. 2, c. 65.

(*d*) The wager of battel was the only decision of the question of right on a writ of right, after the Conquest,—until Henry the Second, by consent of parliament, introduced the *grand assize*, a peculiar species of trial by jury, in concurrence therewith; giving the tenant his choice of either the one or the other. The establishment of this alternative, Glanvil, chief justice to Henry the second, and probably his adviser herein, considers as a most noble improvement, (as in fact it

was,) of the law. “*Est autem magna assisa regale quoddam beneficium, clementia principis, de consilio procerum, populis indultum; quo vitæ hominum, et status integritati tam salubriter consulitur, ut in jure quod quis in libero soli tenemento possidet retinendo, duelli casum declinare possint homines ambiguum. Ac per hoc contingit, insperatæ et præhaturæ mortis ultimum evadere supplicium, vel saltem perennis infamie opprobrium illius infesti et inverecondi verbi, quod in ore victi turpiter sonat, consecutivum.*”—L. 2, c. 7.

(*e*) 3 Bl. Com. 338, 339.

(*f*) See also on the reason of this practice, Co. Litt. 294; Dyversité des Courtes, 304.

[impious custom of private duels on imaginary points of honour,—but hath also traced the heroic madness of knight errantry, from the same original of judicial combats (*g*). But to proceed :]

When the champions arrived within the lists, the champion of the tenant took his adversary by the hand, and made oath that the tenements in dispute were not the right of the demandant; and the champion of the demandant, then taking the other by the hand, swore in the same manner that they were; next an oath against sorcery and enchantment, was to be taken by both the champions, in this or a similar form, “Hear this, ye justices, that I have
“this day neither eat, drank, nor have upon me neither
“bones, stones, ne grass, nor any enchantment, sorcery, or
“witchcraft, whereby the law of God may be abased, or
“the law of the devil exalted.—So help me God and his
“saints (*h*).”

The battel was thus begun; and the combatants were bound to fight till the stars appeared in the evening: and if the champion of the tenant could defend himself till the stars appeared, the tenant was to prevail in his cause; but if victory declared itself for either party, for him was judgment finally given. This victory might arise from the death of either of the champions, or by either of them proving *recreant*, i. e., yielding, and pronouncing the horrible word of *craven*; a word of disgrace and obloquy, rather than any determinate meaning (*i*). The effect of the termination of the battel in either of these modes was,

(*g*) Sp. L. b. 28, cc. 20, 22.

(*h*) 3 Bl. Com. p. 340, who cites Dyer, 301, and Spelm. Gloss. 103. And see Rushw. Coll. vol. ii. pt. 2, fol. 112; 19 Rym. 322; R. v. Dryden, Cro. Car. 512, and 11 Harg. St. Tr. 124, where will be found an account of the proceedings in the last trial by battel, which took place in this country, viz. that in the case of Lord Rea v. Ramsey (7 Ch. 1).

Mr. Hallam (vol. i. p. 278, 7th ed.), refers for the ceremonies of trial by combat, to Houard, Anc. Loix de France, t. 1, p. 264; Velly, t. 6, p. 106; Recueil des Historiens, t. 2, pref. p. 189; Ducange v. *Duellum*. But he says the great original authorities, are the *Assises de Jerusalem*, c. 104, and Beaumanoir, c. 31.

(*i*) 3 Bl. Com. 340.

that the vanquished party forfeited his claim, and paid a fine (*j*): and the champion, if recreant, was condemned *amittere liberam legem*; i. e., to become infamous, and not to be accounted *liber et legalis homo*,—being supposed by the event to be proved foresworn, and not fit to be put upon a jury, or admitted as a witness in any cause (*k*).

In an appeal or approvement, the trial by battel might also be demanded at the election of the appellee, and was carried on with equal solemnity, as in a writ of right: but as each party was here to fight in his proper person,—the appellant or approver, if a woman, a priest, an infant, or of the age of sixty, or lame or blind, might counterplead, and refuse the wager of battel; and compel the appellee to put himself upon the country, that is, submit to trial by jury. Also peers of the realm, bringing an appeal, were not to be challenged to wage battel, on account of the dignity of their persons; nor the citizens of London by special charter, because fighting seems foreign to their education and employment. So likewise if the crime were notorious, as if the thief were taken with the *mainour* (*l*), or the murderer in the room with the bloody knife,—the appellant might counterplead and refuse the tender of battel from the appellee (*m*); for it was unreasonable that an innocent man should stake his life against one who was already half convicted (*n*).

(*j*) Hall. Mid. Ag. ubi sup.

(*k*) 3 Bl. Com. 340. The compiler of the *Assises de Jerusalem*, c. 167, thinks it would be very injurious if no wager of battel were to be allowed against witnesses in causes affecting succession; since otherwise every right heir might be disinherited; as it would be easy to find two persons who would perjure themselves for money, if they had no fear of being challenged for their testimony. The demandant's champion was in fact a witness upon the question of right; and this passage,

as Mr. Hallam remarks, "indicates the real cause of preserving the judicial combat; systematic perjury in witnesses, and want of legal discrimination in judges."—Hall. Mid. Ag. vol. i. p. 282.

(*l*) Vide sup. p. 457.

(*m*) Hawk. P. C. b. 2, c. 45, s. 7. An example of a counterplea of wager of battel, on the principle mentioned in the text, actually occurred in the modern case of *Ashford v. Thornton*, (1 Barn. & Ald. 405,) already instanced (vide sup. p. 497).

(*n*) 3 Bl. Com. 347.

[The form and manner of waging battel upon appeals and approvements, were much the same as upon a writ of right (*o*). The appellee, when appealed of the felony, pleaded not guilty, and threw down his glove; and declared he would defend the same with his body. The appellant, in accepting the challenge, took up the glove; and replied that he was ready to make good his appeal, body for body: and thereupon the appellee, taking the Bible in his right hand, and in his left the right hand of his antagonist, swore to this effect, "*Hoc audi, homo, quem per manum teneo, &c.*," "Hear this, O man, whom I hold by the hand, "who callest thyself John by the name of baptism, that I, "who call myself Thomas by the name of baptism, did not "feloniously murder thy father, William by name, nor am "anywise guilty of the said felony; so help me God and "the saints; and this I will defend against thee by my "body, as this court shall award." To which the appellant replied, holding the Bible and his antagonist's hand in the same manner as the other, "Hear this, O man, whom I "hold by the hand, who callest thyself Thomas by the "name of baptism, that thou art perjured; and therefore "perjured, because that thou feloniously didst murder my "father, William by name; so help me God and the "saints: and this I will prove against thee by my body, "as this court shall award (*p*)."] The battel was then fought with the same weapons, the same solemnities, and the same oaths against amulets and sorcery, that were used in the civil combat: and if the appellee were so far vanquished as not to be able or willing to fight any longer, he

(*o*) Flet. 1. 1, c. 34; Hawk. P. C. b. 2, c. 45.

(*p*) There is a striking resemblance between this process and that of the court of Areopagus, at Athens, for murder; wherein the prosecutor and prisoner were both sworn in the most solemn manner:

the prosecutor that he was related to the deceased (for none but near relatives were permitted to prosecute in that court), and that the prisoner was the cause of his death; the prisoner, that he was innocent of the charge against him. (Pott. Antiq. b. 1, c. 19.)

[was adjudged to be hanged immediately; and then, as also if he were slain in the battel, Providence was deemed to have determined against him, and his blood was attainted. But if he killed the appellant, or could maintain the fight from sun rising till the stars appeared in the evening, he was acquitted. So also if the appellant became recreant, and pronounced the word craven, he lost his *liberam legem*, and became infamous; and the appellee recovered his damages, and was for ever quit, not only of the appeal, but of all indictments likewise for the same offence (r).

IV. The fourth method of trial in criminal cases, is that by the peers of Great Britain, in the court of parliament, (or in the court of the lord high steward,) when a peer, or peeress, is charged with any treason or felony, or misprision of either. [Of this enough has been said in a former chapter(s): to which we shall only now add, that in the method and regulation of its proceedings, it differs but little from the trial, *per patriam* or by jury; except that no special verdict can be here given(t), because the lords of parliament,—or the lord high steward, if the trial be had in his court,—are judges sufficiently competent of the law that may arise from the fact: and except, also, that the peers need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude and bind the minority (u).

V. The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the Great Charter: “*nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruat, nisi per legale iudicium parium suorum, vel per legem terræ*” (x).

(r) 4 Bl. Com. 348.

(s) Vide sup. pp. 382, 383.

(t) Hatt. 116.

(u) Kelynge, 56; stat. 7 Will. 3,

c. 3, s. 11; Foster, 247.

(x) 9 Hen. 3, c. 29.

[The antiquity and excellence of this trial, for the settling of civil property, has before been explained at large (*y*). And it will hold much stronger in criminal cases: since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the Sovereign and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has, therefore, wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the Crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted, without check or control, by justices of *oyer* and *terminer* occasionally named by the Crown; who might then imprison, despatch or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the Crown,] for any felony at least, unless upon an indictment; that is, the presentment or [preparatory accusation of twelve or more of his fellow-subjects (*z*): and that the truth of every accusation, whether preferred in the shape of indictment or information, should afterwards be] brought to trial and [confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion.] •

[What was said of juries in general, and the trial thereby

(*y*) Vide sup. vol. III. pp. 619, 653, 657.

(*z*) The modern provisions under which larcenies, in certain cases, may be disposed of summarily before justices without indictment, are no innovation on this principle,—inasmuch as the *consent* of the person charged,—or, in the case of a juvenile offender, of his parents or guardians,—must be given before such course may be taken. Vide sup. pp. 412, 413.

[in *civil* cases (*a*), will greatly shorten our present remarks with regard to the trial of *criminal* suits, indictments and informations. Which trial we shall consider in the same method that we did the former,—by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.]

When, therefore, a prisoner has pleaded *not guilty* to the indictment or information, the next step is to impanel and swear for that purpose a jury,—called, (when intended to distinguish them from a grand jury,) a *petit* jury,—consisting of twelve persons, who are always to be of the same county where the indictment was found (*b*); and whose qualification, in other respects, is to be the same as that of jurors in civil causes (*c*). But it is a rule that no person who was of the grand jury, by which the bill was found, is competent to sit upon the petit jury (*d*). If the proceedings are before the Court of Queen's Bench, an interval elapses before the trial; during which, process issues for summoning a jury, as in civil causes: and the trial is either at bar (*e*) or *nisi prius*, as mentioned in a former place (*f*). But if the proceedings and trial are in a court of oyer and terminer and general gaol delivery, the sheriff, (by virtue of a general precept, directed to him beforehand by the judges of assize,) returns to such court, a panel of at least forty-eight jurors, to try all issues, whether criminal or civil, at that session (*g*): and therefore it is in such courts usual to try all persons charged with felony immediately or soon after their arraignment. And a similar practice—both as to the summoning jurors and

(*a*) Vide sup. vol. III. p. 613 et seq.

(*b*) 2 Hale, P. C. 264; Hawk. P. C. b. 2, c. 40. As to the finding of the indictment, vide sup. p. 440.

(*c*) Vide sup. vol. III. p. 625, as to the qualification of a juror in respect of estate.

(*d*) 25 Edw. 3, st. 5, c. 3.

(*e*) On an information *ex officio*, the attorney-general is entitled to demand a trial at bar, if he thinks proper. (1 Chit. Cr. L. 848.)

(*f*) Vide sup. p. 387.

(*g*) 2 Hale, P. C. 263; 2 Arch. Just. 18. And see 6 Geo. 4, c. 50, s. 13; 7 Geo. 4, c. 64, s. 21; 15 & 16 Vict. c. 76, s. 105.

as to the time of trial after arraignment—prevails in the case of such persons as are tried at the sessions of the peace. As to *misdemeanors* at the assizes or sessions, it was formerly not customary, (unless by consent of parties, or where the defendant was actually in gaol,) to try persons indicted thereof, at the same sessions in which they had pleaded *not guilty* to the indictment. It is now, however, provided by 14 & 15 Vict. c. 100, s. 27, that no person prosecuted, shall be entitled to *traverse* (that is, postpone) the trial of *any* indictment found against him at any session of the peace, of oyer and terminer, or of gaol delivery(*h*); but that if the court,—upon the application of such person or otherwise,—shall be of opinion that he ought to be allowed a further time, either to prepare his defence or otherwise, such court may adjourn the trial to the next subsequent session, on such terms as to bail or otherwise, as shall seem meet; and may respite the recognizances of the prosecutor's witnesses accordingly. In misdemeanors, also, where the record is in the Court of Queen's Bench, we may remark, that the trial may, by leave of the court, be by a *special* jury; according to the practice in civil actions(*i*). but this is not allowed in misdemeanors tried under commissions of oyer and terminer and gaol delivery, or at the sessions of the peace; nor is a special jury allowed, in cases of treason or felony, wherever tried.

In connection with the subject of trial, we may remark here, that in the case of treason generally, (but with the exception of an attempt to assassinate the sovereign,) it is enacted by statute 7 Will. III. c. 3, that no person shall be tried for the same, or for any misprision thereof, unless

(*h*) To *traverse* properly signifies to plead in denial (vide sup. vol. III. p. 598), and, therefore, in every case, a party who pleads not guilty to an indictment must also be said to traverse the indictment; but the meaning of the statute is, that his

traverse shall not entitle him to a postponement. In the practice of the criminal courts, the word has been ordinarily thus used in connection with a postponement of the trial.

(*i*) See 6 Geo. 4, c. 50, s. 30, &c.

the indictment be found within three years after the offence committed; and that the prisoner shall have the same compulsory process to bring in his witnesses *for* him, as was usual to compel their appearance *against* him. And by statutes of 7 Anne, c. 21 (*i*), and 6 Geo. IV. c. 50, s. 21, the prisoner is in general entitled,—in case of treason and misprision thereof,—to have a copy of the indictment, and a list of the witnesses to be produced against him and of the jurors, delivered to him ten days before the trial (*k*). But by 5 & 6 Vict. c. 51 (*l*), it is provided, that in all cases of treason in compassing or imagining any bodily harm tending to the death or destruction, maiming or wounding, of the Queen, (and in all cases of misprision of any such treason,) where the overt act or acts shall be any attempt to injure in any manner whatsoever the person of the Queen,—the person charged shall be indicted, arraigned, tried, and attainted, in the same manner and according to the same course and order of trial in every respect, and upon the like evidence, as if he stood charged with murder; and that no indictment for such treason, shall be within any of the provisions of the said several Acts of 7 Will. III., 7 Anne, or 6 Geo. IV. touching trials in cases of treason and misprision thereof: but that, upon conviction upon such indictment, judgment shall nevertheless be given, and execution done, as in other cases of treason. As to all indictable offences, it is also enacted by 6 & 7 Will. IV. c. 114, and 11 & 12 Vict. c. 42, s. 27,

(*i*) Extended now to Ireland, by 17 & 18 Vict. c. 26.

(*k*) See *R. v. Frost*, 2 Mood. C. C. 140. In all felonies (treason and misprision thereof excepted), the allowance of a copy of the indictment, and a list of the witnesses, is in the discretion of the court, though in practice they are always allowed both in the case of felonies and misdemeanors (1 Chit. Cr. L. 403).

But in the case of prosecutions for misdemeanors instituted by the attorney or solicitor-general, such copy and list are expressly required by 60 Geo. 3 & 1 Geo. 4, c. 4, s. 8, to be given to the party prosecuted, free of expense, on his application.

(*l*) Vide sup. p. 250. See also 39 & 40 Geo. 3, c. 93.

that all persons charged therewith who are held to bail, or committed to prison, shall be entitled, (upon payment at such reasonable rate as in the latter statute specified,) to copies of the *depositions* on which they have been so held to bail or committed:—and that all persons under trial, may inspect all depositions taken against them, and returned into court, without fee or reward.

[When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve; unless they are challenged by the party.

Challenges may here be made, either on the part of the Crown, or that of the prisoner; and either to the whole array or to the separate polls; for the very same reasons that they may be made in civil cases (*m*). For it is here at least as necessary, as there, that the sheriff or returning officer be totally indifferent; and that the particular jurors should be *omni exceptione majores*; not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum* (*n*).] Besides which, the privilege formerly allowed to aliens in civil, as well as criminal cases, of challenging the array, on the ground that the sheriff has not returned a jury *de medietate linguæ*—that is, a jury one-half of which consisted of aliens, supposing so many to be found in the place,—is still preserved by the express enactment of 6 Geo. IV. c. 50, s. 47 (*o*), in favour of persons indicted for felony or misdemeanor; which provides that, on the prayer of every alien so indicted or impeached, the sheriff (or other proper minister) shall, by command of the court, return for one-half of the jury a competent number of aliens, if so many there be in

(*m*) Vide sup. vol. III. p. 622 et seq.

(*n*) By 6 Geo. 4, c. 50, s. 50, no man shall serve on a jury for the trial of a capital offence, who shall not be qualified as a juror in civil causes within the same county, city or place.

(*o*) This Act repeals (s. 62) the former statutes on this subject, viz. 27 Edw. 3, st. 2, c. 8; 28 Edw. 3, c. 13, and 8 Hen. 6, c. 29. This privilege of aliens, we may remark here, was taken away in *treason*, by 1 & 2 P. & M. c. 10.

the town or place where the trial is had; and if not, then so many aliens as shall be found in the same town or place, if any. And, further, that no such alien juror shall be liable to be challenged for want of freehold or other qualification required by that Act; but that every such alien may be challenged for any other cause.

[Challenges upon any of the foregoing accounts, are styled challenges *for cause*; which may be without stint in both criminal and civil trials (*p*). But in criminal cases, or at least in] cases of felony (*q*), [there is, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all,—which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons: 1. As every man must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner, when put to] his defence [should have a good opinion of his jury,—the want of which might totally disconcert him,—the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, to set him peremptorily aside.

(*p*) Besides these challenges by the parties, the court itself is empowered to amend or enlarge the panels of jurors, by taking out the names of individuals and inserting others where necessary. (6 Geo. 4, c. 50, s. 20.) This Act, by sect. 62, repeals the former Act of 3 Hen. 8,

c. 12, on the same subject.

(*q*) Blackstone says that a peremptory challenge is allowed in "capital" felonies, *in favorem vite* (4 Bl. Com. 353). But the practice extends to all felonies, though not to misdemeanors. (Co. Litt. 156 b.)

[This privilege of peremptory challenges, though granted to the prisoner, is denied to the Crown] by 6 Geo. IV. c. 50, s. 29; which, (repealing and re-enacting the former Act of 33 Edw. I. st. 4, on the same subject,) provides that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. [However, it is held that the king need not assign his cause of challenge till all the panel is gone through; nor unless there cannot be a full jury without the persons so challenged (*r*). And then, and not sooner, the counsel for the Crown must show cause, otherwise the juror shall be sworn (*s*).

The peremptory challenges of the prisoner must, however, have some reasonable boundary, otherwise he might never be tried. This reasonable boundary was settled by the common law to be the number of thirty-five: that is, one under the number of three full juries (*t*). For the law judged that five-and-thirty were fully sufficient to allow the most timorous man to challenge through mere caprice: and that he who peremptorily challenged a greater number, or three full juries, had no intention to be tried at all. And so the law still stands in the case of treason (*u*)],

(*r*) In the case of *Mansell v. The Queen* (in error), 8 Ell. & Bl. 54, the law, as here laid down by Blackstone, in vol. iv. p. 353, was confirmed;—the court of Queen's Bench observing, that neither by 33 Edw. 6, st. 4, nor by 6 Geo. 4, c. 50, was there any intention to take away "all power of peremptory challenge from the Crown, &c., and the course has invariably been to permit the Crown to challenge without cause, till the panel has been called over and exhausted, and then to call over the names of the jurors peremptorily challenged by the Crown, and put the Crown to assign cause, so that if twelve of

"those upon the panel remain, as to whom no just cause of exception can be assigned, the trial may proceed," &c.

(*s*) Hawk. P. C. b. 2, c. 43, s. 3; 2 Hale, P. C. 271. And the practice is the same both in trials for misdemeanors and for capital offences. (3 Harg. St. Tr. 519.)

(*t*) 2 Hale, P. C. 269.

(*u*) This is by the effect of 1 & 2 P. & M. c. 10, s. 7. (See Hawk. P. C. b. 2, c. 43, s. 8.) As to the number of challenges allowed in misprision of treason generally, it seems doubtful. (Hawk. ubi sup. sect. 5.)

except in the case of any attempt to injure the person of the Queen (*x*). But by 6 Geo. IV. c. 50, s. 29 (repealing and re-enacting the former provision of 22 Hen. VIII. c. 14, on the same subject),—no person arraigned for murder or felony shall be admitted to any peremptory challenge above the number of twenty. And by 7 & 8 Geo. IV. c. 28, s. 3, if any person indicted for treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury, than such person is entitled by law to challenge in any of the said cases; every such peremptory challenge beyond the number allowed by law, shall be entirely void: and the trial of such person shall proceed, as if no such challenge had been made.

[If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel,] a *tales* may be awarded, as in civil cases (*y*): supposing the prosecution to be in the Queen's Bench. But if it be under a commission of gaol delivery, the course is for the court to order, *ore tenus*, a new panel to be returned *instantly* (*z*). When at last the proper number, free from all exception, are obtained, they are sworn; and the form of oath in cases of felony, or wherever the defendant appears in person, is as follows: "You shall well and truly try, " and true deliverance make, between our sovereign lady " the Queen, and the prisoner whom you have in charge: " and a true verdict give according to the evidence. So " help you God."

[When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened; and the evidence marshalled, examined, and enforced, by the counsel for the Crown or prosecution.] And it was formerly a settled rule at common law, that no counsel should be

(*x*) By 5 & 6 Vict. c. 51, there is to be in this case "the same course and order of trial in every respect" as in/. charge of murder (*vide sup.*

p. 250).

(*y*) *Vide sup.* vol. III. p. 628.

(*z*)⁶⁴ Inst. 168; 4 St. Tr. 728.

allowed a prisoner upon his trial upon the general issue in any felony, unless some point of law should arise proper to be debated (a); though the judges made no scruple [to allow a prisoner's counsel to instruct him what questions to ask, or even to ask questions for him with respect to matters of fact;] and as to matters of law, considered the prisoner as [entitled to the assistance of counsel.] And by 7 Will. III. c. 3, it was provided in the case of treason generally, that he might make defence by counsel not exceeding two; and [the same indulgence was by 20 Geo. II. c. 30, extended to *parliamentary impeachments* for treason; which were excepted in the former Act.] But the state of the law on this subject is now governed by 6 & 7 Will. IV. c. 114, which sets aside the antient rule altogether; and provides, that all persons tried for any felony may make full answer or defence by counsel; or, in courts where attornies practise, by attorney (b).

[The doctrine of evidence upon pleas of the Crown is, in most respects, the same as that upon civil actions.] There are, however, some leading points wherein a differ-

(a) Sir E. Coke (3 Inst. 137) gives this reason for the rule, "because the evidence to convict a prisoner should be so manifest as it cannot be contradicted." And Lord Nottingham, when high steward, declared (3 St. Tr. 726), that this was the only good reason that could be given. The rule, however, was strongly disapproved by Blackstone; who remarks (vol. iv. p. 355), that however it may be palliated under cover of that noble declaration of the law, that the judge shall be counsel for the prisoner, it is not of a piece with the rest of the humane treatment of prisoners by the English law."

Father Parsons, the Jesuit, and, after him, Bishop Ellys, (Of Eng-

lish Liberty, vol. ii. p. 66,) have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a law of Henry the first; meaning, apparently, chapters 47 and 48, of the code which is usually attributed to that prince. "*De causis criminalibus vel capitibus nemo quærat concilium; quin implacitatus statim perneget, sine omni petitione concilii. In aliis omnibus potest et debet uti concilio.*" But it may be doubted if this refers to the right to have counsel in court.

(b) The allowance of counsel is said by Blackstone, (vol. iv. p. 355,) to have been the rule also of the more antient common law; and he cites the *Mirrour*, c. 3, s. 1. a

ence between civil and criminal evidence, will be found to exist; and among them are the following (*c*):—

[First, in all cases of treason and misprision of treason,—by statutes 1 Edw. VI. c. 12; 5 & 6 Edw. VI. c. 11,] and 7 Will. III. c. 3,—[*two* lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence *confess* the same.] And, by the last-mentioned statute, [it is declared, that both witnesses must be to the same overt act of treason; or one to one overt act, and the other to another overt act of the same species of treason, and not of distinct heads or kinds: and that no evidence shall be admitted to prove *any* overt act, not expressly laid in the indictment (*d*). And therefore in Sir John Fenwick's case, in King William's time, (where there was but one witness,) an Act of Parliament was made on purpose to attain him of treason (*e*); and he was executed thereon (*f*).] But by 5 & 6 Vict. c. 51, when the overt act alleged is an attempt to injure the person of the Queen, the conviction may be supported by the like evidence as if the prisoner stood charged with murder (*g*); and the rule requiring two witnesses, is consequently set aside. In prosecutions for perjury, also, there can be no conviction except on the oath of two witnesses: though it will be sufficient that the perjury be directly proved by one witness; and that corroborative evidence, on some particular point, be given by another (*h*); and where the alleged

(*c*) Besides the differences which here follow, it is to be remarked that some of the rules of evidence introduced by 17 & 18 Vict. c. 125, (The Common Law Procedure Act, 1854,) do not apply to criminal, but only to civil cases. (Vide sup. vol. III. pp. 633, 635, 642, 644) One of these, however, viz. 17 & 18 Vict. c. 125, s. 20, permitting any person called as a witness, and unwilling from conscientious motives to be sworn, to make affirmation instead (vide sup. vol. III. p. 635), has been

since that Act, viz., by 24 & 25 Vict. c. 66, extended also to criminal proceedings.

(*d*) See St. Tr., vol. ii. p. 144; Foster, 235.

(*e*) Stat. 8 Will. 3, c. 4.

(*f*) St. Tr. vol. xi.

(*g*) Vide sup. p. 250. And see 39 & 40 Geo. 3, c. 93.

(*h*) See *R. v. Mayhew*, 6 Car. & P. 315; *R. v. Parkery*, 1 Car. & M. 639; *The Queen v. Black*, 27 L. J. (M. C.) 222.

perjury consists in the defendant's having contradicted what he himself swore on a former occasion, the testimony of a single witness in support of the defendant's own original statement will support a conviction (*i*). But, [in almost every other accusation, the oath of one positive witness will be sufficient:] the exception in case of treason, being allowed in order to secure the subject more effectually from false accusation in a case so penal, and where there may be danger of his being made the victim of political oppression: in the case of perjury, because it would not be reasonable to convict, where there is only one oath against another (*j*).

Secondly, a confession of his guilt by the defendant, is in general sufficient to support a conviction. But this is only on the supposition that it is freely and voluntarily made; for otherwise, it is not even admissible in evidence. If drawn from him, therefore, by means of any threat or promise, it cannot, in general, be received (*k*); and it is in no case evidence, except against himself (*l*). It is also a

(*i*) R. v. Harris, 5 B. & Ald. 929.

(*j*) 4 Bl. Com. 357; see R. v. Muscot, 10 Mod. 194, Champney's case, 2 Lewin, C. C. 258. Montesquieu lays it down, (Sp. L. b. 12, c. 3,) that those laws which condemn a man to death, in any case, on the deposition of a single witness, are fatal to liberty; and he adds this reason,—that the witness who affirms, and the accused who denies, make an equal balance; and that there is a necessity, therefore, to call in a third man to incline the scale. "But this," says Blackstone (vol. iv. p. 357), "seems to be carrying matters too far; for there are some crimes in which the very privacy of their nature excludes the possibility of having more than one witness. Neither, in deed," he adds, "is the bare denial

"of the person accused, equivalent to the positive oath of a disinterested witness."

(*k*) See Reg. v. Luckhurst, 1 Dearsley's C. C. R. 245; R. v. Sice-man, *ibid.* 219. As to the statement, however, of a person charged before a magistrate,—it will be remembered that when made *after being duly cautioned*, it is expressly provided by 11 & 12 Vict. c. 42, s. 18, that what he says may be given in evidence against him. (Vide sup. pp. 433, 434.) See also an exception in the case of *gaming-houses*, noticed sup. p. 354; and in the case of bankruptcy, sup. vol. 11. p. 166. As to the last of these exceptions, see Sloggett's case, 1 Dearsley's C. C. R. 656.

(*l*) See also 7 Geo. 4, c. 64, by which provisions were previously

rule that if any part of a confession is used to establish the case on the part of the prosecution, the whole of it must be given in evidence; though the jury are at liberty to believe those parts which make against the defendant, and to disbelieve what he alleges in his own favour (*m*).

Thirdly, the deposition of witnesses before magistrates,—if duly taken according to the provisions of 11 & 12 Vict. c. 42, s. 17,—may be produced at the trial, and given in evidence against the defendant, if the party who made the deposition is dead, or so ill as not to be able to travel (*n*).

Fourthly, though by the general rule of law, all hearsay evidence,—that is, any statement not made in court, and upon oath,—is excluded; yet on a charge of homicide, it is the practice to admit in evidence the dying declarations of the deceased, with respect to the cause of his death,—provided they appear to have been made under a sense of his approaching dissolution (*o*).

Fifthly, though by 16 & 17 Vict. c. 83, the husband or wife of any party to a legal proceeding, is now in general competent and compellable to give evidence on behalf of either or any of the parties, yet it is also thereby expressly provided that this is not to extend to compel or enable a husband to give evidence for or against his wife, or a wife to give evidence for or against her husband, in any *criminal* proceeding (*p*). And before this statute, such evidence

made on the same subject, and which 11 & 12 Vict. c. 42, only repeals in part.

(*m*) *R. v. Clewes*, 4 Car. & P. 221.

(*n*) See *R. v. Scaife* and others, 20 L. J. (M. C.) 229; *Queen v. Upton*, St. Leonard's, 10 Q. B. 827; *Queen v. Clements*, 30 L. J. (M. C.) 193; *Reg. v. Beeston*, 1 Dearsley's C. C. R. 405; *The Queen v. Cockburn*, 26 L. J. (M. C.) 136. So the depositions may be used if the witnesses be insane or kept away by

the prisoner; see *Austin's case* (per Willes, J.), 1 Dearsley's C. C. R. 612.

(*o*) See as to dying declarations, *R. v. Mosley*, 1 R. & M. C. C. R. 97; *R. v. Hayward*, 6 Car. & P. 157; *R. v. Perkins*, 9 Car. & P. 395; *R. v. Scaife*, 1 M. & Rob. 551; *The Queen v. Reany*, 26 L. J. (M. C.) 43; *The Queen v. Hind*, 29 L. J. (M. C.), 147.

(*p*) Vide sup. vol. II. p. 276, vol. III. p. 635.

was (as it still is) inadmissible, as the general rule. Yet this has been always open to certain exceptions. Thus, in treason, a wife may give evidence against her husband, because the tie of allegiance is paramount to all others (*q*). So upon a charge of forcible abduction and marriage, or other violence to her person, the woman is a competent witness against her husband (*r*).

Sixthly, [it was an antient and commonly received practice (*s*),—derived from the civil law, and which also has obtained in France (*t*),—that as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered, to the honour of Mary the first, (whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous,) that when she appointed Sir Richard Morgan chief justice of the Common Pleas, she enjoined him, “that notwithstanding the old error, which “did not admit any witnesses to speak, or any other matter “to be heard, in favour of the adversary, her majesty being “party;—her highness’s pleasure was, that whatsoever “could be brought in favour of the subject, should be “admitted to be heard; and moreover, that the justices “should not persuade themselves to sit in judgment “otherwise for her highness than for her subjects (*u*).”] Afterwards, in one particular instance,—when embezzling the royal stores was made a capital felony (*x*),—it was provided, [that any person impeached for such felony

(*q*) 1 Chit. Bl. 444, n. There seems to be an exception, however, in the case of an attempt to injure the person of the Queen; for in that case, by 5 & 6 Vict. c. 51, the defendant is to be “tried upon the “like evidence as if charged with “murder.” Vide sup. p. 506.

(*r*) 1 Chit. Bl. 444, n.; 1 Phil. Ev. 71; Lord Audley’s case, 3 St. Tr. 402.

(*s*) St. Tr. i. *passim*.

(*t*) Domat, Publ. Law, b. 3, tr. 1; Montesq. Sp. L. b. 39, c. 11.

(*u*) Hollingsh. 1112; St. Tr. i. 72.

(*x*) This was by 31 Eliz. c. 4, a statute repealed by 7 & 8 Geo. 4, c. 27. As to the existing provision with regard to this offence, vide sup. p. 214.

[“should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defence:” and, in general, the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath(*y*): the consequence of which still was, that the jury gave less credit to the prisoner’s evidence, than to that produced by the Crown. Sir Edward Coke protests very strongly against this tyrannical practice; declaring, that he never read, in any Act of parliament, book-case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and that therefore there was not so much as *scintilla juris* against it(*z*). And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland(*a*), (when felonies committed by Englishmen in Scotland, were ordered to be tried in one of the three northern counties,) they insisted on a clause, and carried it against the efforts of both the Crown and the house of lords(*b*),—against the practice of the courts in England, and the express law of Scotland(*c*);—“that in all such trials, for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses, to be examined upon oath, as can be produced for his clearing and justification.” At length by the statute 7 Will. III. c. 3, the same measure of justice was established throughout all the realm, in cases of] treason causing any corruption of blood, and of misprision thereof: [and it was afterwards declared, by statute 1 Anne, st. 2, c. 9, that in all cases of treason and felony, all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him.]

(*y*) 2 Bulst. 147; Cro. Car. 292.

(*b*) Com. Journ. 4, 5, 12, 13, 15,

(*z*) 3 Inst. 79. See also 2 Hale,

29, 30 Jun. 1607.

P. C. 33, and his Summary, 264.

(*c*) 4 Jun. 1607.

(*z*) Stat. 4 Jac. 1, c. 1.

And now, there is no distinction in this matter between civil and criminal proceedings. In all cases, every witness who is examined, must give his evidence under the sanction of an oath, or of some affirmation allowed in substitution of an oath (*d*).

Lastly, the defendant in a criminal prosecution is allowed to call witnesses to speak, generally, to his character: though he is not allowed to prove particular actions bearing favourably on his character; unless they happen to stand in connection with some of the facts, charged and proved against him. And in connection with this we may notice that, by 6 & 7 Will. IV. c. 111, where a person is tried for committing a felony not punishable with death, after a previous conviction for felony,—the jury shall not be charged to inquire concerning such previous conviction until they shall have inquired concerning such subsequent felony, and found such person guilty of the same (*e*): but that the Act makes an exception as to this, if the prisoner gives evidence as to character; for in that case the prosecutor may in answer thereto give evidence of the previous conviction, before the subsequent offence is found; and the jury shall then inquire of the previous conviction and subsequent offence, at the same time (*f*).

[When the evidence on both sides is closed,—and indeed when any evidence hath been given,—the jury cannot be discharged, (unless in cases of evident necessity,) till

(*d*) Vide sup. vol. III. pp. 631, 635.

(*e*) The reason is given in the preamble to the Act,—viz. the exemplary punishment to which such offender is liable by law. For by 7 & 8 Geo. 4, c. 28, s. 11, and 20 & 21 Vict. c. 3, he is, in general, liable to penal servitude *for life* or not less than three years, or imprisonment for *four years*, to which, if a male, whipping may be added. As to his punishment where the subsequent felony is *simple larceny*, vide sup. p. 204.

(*f*) See 24 & 25 Vict. c. 96, s. 116, and c. 99, s. 37, regulating, in other respects, the practice as to trying indictments for offences after a previous conviction; and according to which the offender is, in the first instance, *arraigned* upon so much of the indictment only as charges the subsequent offence. Some doubt appears to be entertained whether this practice is confined to offences under those Acts, or is general. See Arch. Pl. & Ev. 15th ed., p. 831; The Criminal Law Acts, by Creaves, p. 203.

[they have given in their verdict (*f*): but are to consider of it, and deliver it in, with the same forms as upon civil causes (*g*). But the judges may adjourn, while the jury are withdrawn to confer, and return to receive the verdict in open court (*h*).] And when the trial runs to such a length, that it cannot be concluded in one day, the established practice now is to adjourn the court till the next morning; but the jury must be somewhere kept together, so that they may have no communication except with each other (*i*). Such verdict [may be either general, as “guilty,” or “not guilty;” or special, setting forth all the circumstances of the case, and praying the judgment of the court (*k*); whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they *doubt* the matter of law, and therefore *choose* to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict,—if they think proper so to hazard a breach of their oaths. But the practice some time in use, of fining, imprisoning, or otherwise punishing jurors, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal. And it is treated as such, by Sir Thomas Smith, two hundred years ago; who accounted such doings “to be “very violent, tyrannical, and contrary to the liberty and “custom of the realm of England (*l*).” For, as Sir Matthew Hale well observes (*m*), it would be a most unhappy case for the judge himself, if the prisoner’s fate depended upon his directions: unhappy also for the prisoner; for, if

(*f*) Co. Litt. 227; 3 Inst. 110; Foster, 27; Gould’s case, Hil. 1764.

(*g*) As to the verdict in civil causes, vide sup. vol. III. p. 648 et seq. Blackstone here notices (vol. iv. p. 360), as one point upon which the practice relative to verdict varies from that in civil causes, that the jury cannot “in a criminal “case, which touches life or mem-
ber, give a *privy* verdict.” As

to which, vide sup. vol. III. p. 651, n. (*f*).

(*h*) 3 St. Tr. 731; 4 St. Tr. 231, 455, 485.

(*i*) Stone’s case, 6 T. R. 527; 1 Chit. C. L. 632.

(*k*) See an example of a special verdict, in an indictment for a nuisance, R. v. Tindall, 6 A. & E. 143.

(*l*) Smith’s Commonw. l. 3, c. 1.

(*m*) 2 Hale, P. C. 313.

[the judge's opinion must rule the verdict, the trial by jury would be useless. Yet, in many instances, where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside; and a new trial granted by the court of queen's bench (*n*). But there hath yet been no instance of granting a new trial, where the prisoner was found *not* guilty on the first (*o*).

If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation (*p*). And upon such his *acquittal*,—or upon his discharge for want of prosecution, or upon the bill of indictment not being found by the grand jury (*q*),—he shall be immediately set at large, without payment of any fee to the gaoler (*r*). But if the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted (*s*). Which conviction, therefore, may accrue two ways, either by his confessing the offence, and pleading guilty; or by his being found so by the verdict of his country.]

With such conviction of the offender two collateral cir-

(*n*) See *R. v. Read*, 1 Lev. 9; St. Tr. x. 416; *R. v. Whitehouse*, 1 Dearsley, C. C. 1. Such new trial, however, will not, it is said, be granted unless the record be in the Queen's Bench, either originally or on removal by *certiorari*, before verdict found. (Arch. Pl. & Ev. 15th ed. p. 160.)

(*o*) Hawk. P. C. b. 2, c. 47, s. 11. But see *R. v. Scaife* and others, (17 Q. B. 238,) a recent case in which a verdict, finding one of the prisoners charged with a *felony* not guilty, was set aside and a new trial ordered, on the ground of misdirection as to evidence. And as to *misdemeanors*, there have been several instances in which a new trial has been granted after a verdict of acquittal; but chiefly in cases of indictments for

nonfeasance, and such as involve civil liability, though the proceeding is criminal in form. (See *The Queen v. Russell*, 3 Ell. & Bl. 912.)

(*p*) The civil law in such case only discharges him from the same accuser, but not from the same accusation. Ff. 48, 2, 7, s. 2.

(*q*) Vide sup. p. 487, n. (*y*).

(*r*) See 14 Geo. 3, c. 20; 55 Geo. 3, c. 50; 8 & 9 Vict. c. 114; *R. v. Coles*, 8 Q. B. 75.

(*s*) In the Roman republic, when the prisoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was something particularly delicate; not that he was guilty, but that he had not been enough upon his guard: "*parum cavisse videtur.*" (Festus, 325.)

cumstances are connected—first, the allowance of the expenses of the prosecutor; and secondly, in case of larceny, the restitution of his goods.

1. And, first, by 7 Geo. 4, c. 64, s. 22 (*t*), the court before whom an indictment for any *felony* is preferred (*u*), is empowered to allow the expenses of the prosecutor and his witnesses (*x*),—with compensation for their trouble and loss of time (*y*): and this whether the case shall terminate in conviction or acquittal, or in the throwing out the bill of indictment (*z*). And by 10 & 11 Vict. c. 82, and 18 & 19 Vict. c. 126, similar powers are given to justices at petty

(*t*) This Act repeals the previous enactments contained in 27 Geo. 2, c. 3; 18 Geo. 3, c. 19; 58 Geo. 3, c. 70.

(*u*) See also 7 & 8 Vict. c. 2, s. 1, as to offences committed on the *high seas*; 17 & 18 Vict. c. 104, s. 267, as to offences by *British seamen*; 19 & 20 Vict. c. 16, s. 13; 24 & 25 Vict. c. 134, s. 223, as to prosecutions under the *Bankruptcy Act*; and 25 & 26 Vict. c. 65, s. 12, as to prosecutions removed for trial to the *Central Criminal Court*.

(*x*) By 7 Geo. 4, c. 64, s. 28, and 14 & 15 Vict. c. 55, s. 8, the court may also order compensation to parties who have been active in the *apprehension* of certain offenders. (Vide sup. pp. 431, 432.) We may remark here, that costs are also in some cases allowed to *defendants* in criminal proceedings. For by 4 & 5 W. & M. c. 18, if the prosecutor, on an information filed by the Master of the Crown office, does not try within a year after issue joined, or if the defendant be acquitted by verdict, or a *nolle prosequi* be entered; the Court of Queen's Bench may award costs to the defendant,—unless the judge before whom it is tried

certifies in open court on the trial, that there was a reasonable ground for the prosecution. See also 19 & 20 Vict. c. 16, ss. 25, 26; and 25 & 26 Vict. c. 65, s. 12, in reference to the expense of witnesses for prisoners, tried under those Acts.

(*y*) By 14 & 15 Vict. c. 55, s. 4, the amount of costs and expenses to be allowed, is placed under the superintendence of the secretary of state; and the costs of prosecutions, being charged in the first instance upon the county rate, (or in the case of a borough with a separate quarter sessions on the borough rate,) are repaid to the treasurer of the county (or borough) out of monies provided by parliament. The amount of the sum granted for the year ending 31st March, 1862, for prosecutions at assizes and quarter sessions, &c. was 167,678*l*. (See 25 & 26 Vict. c. 71.)

(*z*) Even if no bill is preferred, the court before whom any person has been summoned to attend by recognizance or subpoena, may be compensated for expenses incurred and trouble and loss of time, either in attending such court or the examining justices. (7 Geo. 4, c. 64, s. 22.)

sessions, dealing with offences under those Acts, in the exercise of their summary jurisdiction. Moreover, though there is no general provision on this subject with regard to *misdemeanors*, the costs of prosecution are provided for in the same way, in reference to a great variety of misdemeanors, by the particular Act under which the misdemeanor is punishable (*a*).

2. [By the common law there was no restitution of goods upon an indictment, because it is at the suit of the Crown only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again (*b*).] But afterwards, by statute 21 Hen. VIII. c. 11, where any person was convicted of larceny, by the evidence of the party robbed, such party was to have full restitution of his money, goods and chattels,—or the value of them out of the offender's goods, (if he had any,)—by a writ to be granted by the justices. And latterly, it became the practice for the court, [upon the conviction of a felon, to order, without any writ, immediate restitution of such goods as are brought into court, to be made to the several prosecutors (*c*).] And though the statute of 21 Hen. VIII. is repealed (*d*), a writ or order of restitution may now, in many cases, be issued under the provision of 24 & 25 Vict. c. 96, s. 100 (*e*); which enacts that if any person, guilty of any felony or misdemeanor mentioned in that Act (*f*), in stealing, taking, obtaining, extorting,

(*a*) See the following enactments:—10 & 11 Vict. c. 82; 13 & 14 Vict. c. 101; 14 & 15 Vict. c. 55, s. 3; 19 & 20 Vict. c. 16, s. 13; 24 & 25 Vict. c. 96, s. 121; c. 97, s. 77; c. 98, s. 54; c. 99, s. 42; c. 100, s. 77.

(*b*) 3 Inst. 242. As to an appeal, vide sup. p. 463.

(*c*) There is no power, either at common law or by statute, for a judge to give any direction, as to the disposal of chattels found on a felon, which do not belong to the

prosecutor. See the *Queen v. The Corporation of London*, 1 Ell. Bl. & Ell. 509.

(*d*) By 7 & 8 Geo. 4, c. 27.

(*e*) Re-enacting 7 & 8 Geo. 4, c. 29, s. 57, repealed by 24 & 25 Vict. c. 95.

(*f*) An exception, however, is made with regard to prosecutions of *trustees*, *bankers* and other *agents* for misdemeanors under the Act, in respect of goods or documents of titles entrusted to them. (24 & 25 Vict. c. 96, s. 100.)

embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property, shall be indicted for the same, by or on behalf of the owner, his executor or administrator, and be convicted thereof,—the property shall in such case, be restored to the owner or such his representative; and the court shall have power to award, from time to time, writs of restitution for such property, or to order the restitution thereof in a summary manner (*g*). This, however, is subject to a proviso as to valuable securities, that no restitution shall be awarded if before the award thereof it shall appear that they shall have been *bonâ fide* paid or discharged by some person liable to the payment thereof;—or, (being negotiable instruments,) shall have been *bonâ fide* taken by transfer or delivery, by some person for a just and valuable consideration;—without any notice or reasonable cause to suspect that they had been stolen, taken, obtained, extorted, embezzled, converted or disposed of by means of any felony or misdemeanor.

It is to be observed with respect to restitution after conviction, that it [reaches the goods so stolen, notwithstanding the property of them is endeavoured to be altered by sale in a market overt (*h*);] a doctrine on which

(*g*) A similar power is given to the *justices of the peace*, on their summarily convicting a juvenile offender of larceny, under the provisions of 10 & 11 Vict. c. 82; 13 & 14 Vict. c. 37; or on their exercising the summary jurisdiction conferred on them in certain cases of larceny, by 18 & 19 Vict. c. 126.

(*h*) 1 Hale, P. C. 513; 4 Bl. Com. 363. Even without any award of restitution, the party may peaceably retake his goods wherever he happens to find them, unless a new property have been fairly acquired therein. And he may bring an action of *trover* against any one who

has bought them in market overt, after he has prosecuted the thief to conviction. (*Scattergood v. Sylvester*, 15 Q. B. 506.) He may also bring an action against the felon after conviction, in case he receives a pardon. But such actions lie not before conviction[†] for so felonies would be made up and healed; and also recaption is unlawful, if done with intention to smother or compound the larceny. (4 Bl. Com. 363.) As to recaption, vide sup. vol. III. p. 352. As to market overt, vide sup. vol. II. p. 72. As to compounding felony, vide sup. p. 313.

Blackstone remarks, that [though it may seem somewhat hard on the buyer, yet the rule of law is, that *spoliatus debet, ante omnia, restitui*; especially when he has used all the diligence in his power to convict the felon. And since the case is reduced to this hard necessity, that either the owner or the buyer must suffer, the law prefers the right of the owner, — who has done a meritorious act by pursuing a felon to condign punishment, — to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction.]

CHAPTER XXIII.

OF JUDGMENT AND ITS CONSEQUENCES.



WE are now to consider the next stage of criminal prosecutions after trial and conviction are past,—which is that of *judgment* (a). For when, upon a charge of felony, the jury have brought in their verdict, guilty, in the presence of the prisoner, [he is either immediately, or at a convenient time soon after, asked by the court, if he has anything to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor, (the trial of which may and does usually happen in his absence,) a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry;] but no corporal punishment can in any case be awarded against a defendant, unless he be personally present (b). [But whenever he appears in person, he may at this period offer any exceptions to the indictment, in *arrest of judgment* (c);] as for some defect

(a) Vide sup. p. 424.

(b) Hawk. P. C. b. 2. c. 48, s. 17. The defendant must in all cases be personally before the court, in order to move in arrest of judgment. (Com. Dig. Indictment, N.) And to enable him so to move, he must, in capital cases, be asked, before judgment, “what he has to say “why judgment of death should “not be pronounced against him.” (Ibid.) *

(c) At this period of the pro-

ceedings it was, that the prisoner formerly might avoid a judgment of death, by praying the *benefit of clergy*; it being more usual to resort to this, after conviction, than by way of declinatory plea to the indictment [as to which, vide sup. p. 482, n. (c)]. This benefit of clergy constituted, in former times, so remarkable a feature in our criminal law, and a general acquaintance with its nature is still so important for the illustration of our books;

apparent on the face of the record; for it is to defects of that kind only, that the motion in arrest of judgment applies. Formerly, indeed, the judgment might be arrested for merely formal defects, as for want of sufficient certainty in setting forth the person, the time, or the place; but

that it may be desirable to subjoin here some further notice on the subject. It originally consisted, in the privilege allowed to a clerk in orders, when prosecuted in the temporal court, of being discharged from thence, and handed over to the Court Christian, in order to make canonical purgation,—that is to clear himself on his own oath, and that of other persons as his compurgators [see Reeves's Hist. Eng. I. vol. 2, pp. 14, 134; 25 Edw. 3, st. 3, c. 4; and as to canonical purgation, sup. vol. III. p. 450, n. (d)]: a privilege founded, as it is said, upon the text of Scripture, "Touch not mine anointed, and do my prophets no harm." In England, this was extended by degrees to all who could read, and so were capable of becoming clerks; and ultimately allowed by 5 Ann. c. 6, without reference to the ability to read. (Reeves, ubi sup., et vol. 4, p. 156; 2 Inst. 637; 1 Edw. 6, c. 12.) But by 4 Hen. 7, c. 13, it was provided, that laymen allowed their clergy should be burned in the hand, and should claim it only once; and as to the clergy,—it became the practice in cases of heinous and notorious guilt, to hand them over to the ordinary *absque purgatione faciendâ*, the effect of which was that they were to be imprisoned for life, (4 Bl. Com. 369;) although afterwards, by 18 Eliz. c. 7, the delivering over to the ordinary, was abolished altogether. As to the nature of the

offences to which the benefit of clergy applied, it had no application except in capital felonies; and from the more atrocious of these it had been taken away by various statutes, prior to its late entire abolition by 7 & 8 Geo. 4, c. 28, s. 6. As the law stood at the time of that abolition, clerks in orders were, by force of the benefit of clergy, discharged in clergyable felonies without any corporal punishment whatever, and as often as they offended (2 Hale, P. C. 375); the only penalty being, a forfeiture of their goods. And the case was the same with peers and peeresses, as regards the first offence; and even after the 7 & 8 Geo. 4, c. 28, doubts were entertained whether the privilege of lords or peers in parliament in this respect, did not still exist. This doubt led to the passing of 4 & 5 Vict. c. 22, enacting that, upon conviction for any felony, such persons shall be punishable as any other of her majesty's subjects. As to commoners, also, they could have benefit of clergy only for the first offence; and they were discharged by it from the capital punishment only,—being subject on the other hand, by 3 Geo. 1, c. 11, 6 Geo. 1, c. 23, and 19 Geo. 3, c. 74, not only to forfeiture of goods, but to burning in the hand, whipping (except in manslaughter), fine, and imprisonment, (or, in certain cases, transportation,) in lieu of the capital sentence. See 4 Bl. Com. p. 371.

now, as we have seen, defects of a merely formal kind are, in some cases, wholly immaterial; and, in none, are allowed to be brought forward, except by way of demurrer or motion to quash the indictment (*d*): so that a motion, in arrest of judgment, can be now made only in respect of some substantial objection (*e*). Upon such motion, if the objection taken appear to be sufficient, the court will arrest the judgment; that is, abstain from pronouncing any judgment, and discharge the prisoner. But such a result is not, like an acquittal by verdict, an absolute discharge from the matter of accusation, for the party may be indicted again (*f*). By recent legislation, another method also is now provided for protecting a prisoner found guilty by verdict, from having judgment or execution awarded against him, where, in point of law, it ought not to be awarded; for, supposing the trial to be in a court of oyer and terminer, gaol delivery, or quarter sessions, and any question of law to arise on motion for arrest of judgment, (or even independently of such motion,) which it finds too difficult for its determination,—such court is now empowered by 11 & 12 Vict. c. 78, to *reserve* the question; and to state it in the form of a special case for the consideration of the judges of the superior courts; and in the meantime to postpone the judgment, or respite the execution of it, as may be thought fit (*g*).

[A *pardon* also, as has been before said (*h*), may be pleaded in arrest of judgment;] and (in case of a capital

(*d*) Vide sup. pp. 446 et seq. 485.

(*e*) An instance of the kind of objection which can still be made in arrest of judgment, is where, in a count for receiving stolen goods, there is no allegation that the person charged knew they were stolen. (See *Larkin's case*, 1 Dears. C. C. R. 365.)

(*f*) See 4 Rep. 45.

(*g*) The judges, when sitting to dispose of special cases on questions

reserved, are sometimes spoken of as the "Court of Criminal Appeal," and the term has been adopted in the 16 & 17 Vict. c. 30. (See sect. 4.) As to the course of practice to be observed on the hearing of such special case, see Reg. Gen. 1st June, 1850. As to the questions which may be reserved, see the case of *The Queen v. Mellor*, 27 L. J. (M. C.), 121.

(*h*) Vide sup. p. 471.

felony) it [has the same advantage when pleaded here, as when pleaded upon arraignment, viz. the saving the attainder. And, certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible.]

[If all these resources fail, the court must pronounce *judgment* ;] by awarding the punishment [which the law hath annexed to the crime; and which hath been constantly mentioned, together with the crime itself, in the course of the former chapters ;] and such judgment ought regularly (as in civil actions) in all cases to be *recorded* (i). The punishment of offences is in some cases governed by the common law only, but is more frequently defined by statute (k). In misdemeanors, it is generally fine or imprisonment, or both ; in felonies, it is, in some instances, death, but usually imprisonment or penal servitude: the imprisonment being frequently accompanied (both in misdemeanor and felony) with hard labour—to which whip-

(i) By 4 Geo. 4, c. 48, whenever any person shall be convicted of any capital felony, except *murder*, and the court before whom he is convicted shall be of opinion that, under the particular circumstances of the case, he is a fit subject for the royal mercy, the court may abstain from pronouncing judgment of death, and instead of pronouncing it, only order it to be *recorded* ; which, being entered on record, is to have the same effect as if the judgment had been pronounced, and the offender relieved. By 6 & 7 Will. 4, c. 30, and 7 Will. 4 & 1 Vict. c. 77, s. 3, the above exception was in effect taken away ; but both of these last provisions are now (so far as respects the present point) repealed by 24 & 25 Vict. c. 95, and the power

of the court (under 24 & 25 Vict. c. 100, s. 2) to cause sentence of death to be *recorded* in cases of murder, appears to be somewhat doubtful. See Criminal Acts, by Greaves, p. 30 ; Arch. Pl. & Ev. in Crim. Ca. 15th ed. 534 ; Rosc. Dig. C. C. 208.

(k) In a case of a *felony* for which no other punishment is provided, there may, by 7 & 8 Geo. 4, c. 28, s. 8, and 20 & 21 Vict. c. 3, be awarded penal servitude to the extent of seven years, or imprisonment (with or without hard labour, solitary confinement and whipping) to the extent of two years. In case of a *misdemeanor* for which no other punishment is provided, there may be awarded, by the common law, fine and imprisonment at the discretion of the court.

ping (*l*) and solitary confinement, to the extent presently to be mentioned, are also sometimes added.

In cases punishable at common law, the judge has a discretion whether fine or imprisonment, or both, shall be awarded, and the measure of either is also left to his decision. And where the punishment is fixed by statute, there is also usually reposed in him, in cases of felony, a discretion between imprisonment and penal servitude; and in case both of felony and misdemeanor, (where either of these modes of punishment is adopted,) a power of determining, within certain limits at least, the period of its duration (*m*). The judge, however, cannot award either death or penal servitude, for any offence to which such punishment is not specifically made applicable by the law itself. And by the Bill of Rights it is declared as one of the antient rights and liberties of the subjects of this

(*l*) The punishment of *whipping* (as to which see further, post, p. 532) was inflicted, at common law, on persons of inferior condition, who were guilty of petit larceny, and other smaller offences, but it seems that, by the usage of the Star Chamber, it was never to be inflicted on a gentleman (1 Chit. C. L. 796). Blackstone enumerates also (vol. iv. p. 377) the *pillory*, the *stocks*, and the *ducking stool*, as ignominious punishments known to the English law. But the first of these is abolished by 7 Will. 4 & 1 Vict. c. 23, and the two last are disused.

(*m*) Whenever sentence is passed for felony, on a person already imprisoned under sentence for another crime, the court may award imprisonment for the subsequent offence, to commence from the expiration of the first imprisonment (7 & 8 Geo.

4, c. 28, s. 10). And where such person is already under sentence either of imprisonment or penal servitude, the court, if empowered to sentence to penal servitude, may award it for the subsequent offence, to commence at the expiration of the first sentence; and this, although the aggregate term of imprisonment or penal servitude, respectively, may exceed the term for which either punishment could otherwise be awarded. (7 & 8 Geo. 4, c. 28, s. 10; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.) Moreover in all cases where the court by any statute is empowered or required to award a sentence of penal servitude exceeding *seven years*, the court may substitute the term of seven years, or else imprisonment, with or without hard labour, to the extent of two years (9 & 10 Vict. c. 24; 20 & 21 Vict. c. 3).

realm, that no cruel and unusual punishments are to be inflicted (*o*). Some further remarks on those that have been mentioned, may here be material.

As to *finēs*, their *quantum* [neither can nor ought to be ascertained, by any invariable law. The value of money itself changes from a thousand causes; and at all events what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the Twelve Tables at Rome fined every person, who struck another, five-and-twenty denarii: which, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomsoever he pleased, and then tender them the legal forfeiture. Our statute law has not, therefore, often ascertained the quantity of fines, nor the common law ever,—it directing such an offence to be punished “by fine” in general, without specifying the certain sum,—which is fully sufficient when we consider that, however unlimited the power of the court may seem, it is far from being wholly arbitrary, but its discretion is regulated by law.] For the Bill of Rights,—which, as just mentioned, prohibits cruel and unusual punishments,—also particularly declares that excessive fines shall not be imposed (*p*); [and the same statute further declares, that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void,]—a doctrine held long before (*q*): [since thereby many times undue means and more violent prosecution would be used for private lucre, than the quiet and just proceeding of law would permit.

The reasonableness of fines in criminal cases has also been usually regulated by the determination of *Magna*

(*o*) 1 W. & M. sess. 2, c. 2.

(*p*) When the judges imposed a fine of 30,000*l.* on the Duke of Devonshire, for striking within the limits of one of his majesty's palaces, the house of lords determined that

their conduct was oppressive and illegal. (11 Harg. St. Tr. 136; and see as to Oates's case, 4 Harg. St. Tr. 106.)

(*q*) 2 Inst. 48.

[*Charta*, c. 14, concerning amercements for misbehaviour by the suitors in matters of civil right. "*Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti, salvo contenemento suo; et mercator eodem modo, salvâ mercandisâ suâ; et villanus eodem modo amercietur, salvo wainagio suo.*" A rule that obtained even in Henry the second's time (*q*); and means only that no man shall have a larger amercement imposed upon him than his circumstances or estate will bear; saving to the landowner his contenement or land (*r*); to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry. In order to ascertain which, the Great Charter also directs, that the amercement, which is always inflicted in general terms ("*sit in misericordiâ*"), shall be set, *ponatur*, or reduced to a certainty, by the oath of good and lawful men of the neighbourhood. Which method of liquidating the amercement to a precise sum, was usually performed in the superior courts (*s*) by the assessment or *affeerment* of the coroner, a sworn officer chosen by the neighbourhood, under the equity of the statute of Westm. 1, c. 18; and then the judges estreated the amount into the Exchequer (*t*). Amercements imposed by the superior courts on their own officers and ministers, were affeered by the judges themselves; but when a pecuniary mulct was inflicted by them on a stranger to,] or person not being an officer of, the

(*q*) Glanv. b. 9, c. 8, s. 11.

(*r*) Lord Coke says, "that *contenement* signifieth his *countenance*, "as the armour of a soldier is his "countenance, the books of a scholar his countenance, and the like."—(2 Inst. 28.) He adds, that "the *wainagium* is the countenance of "the villain; and it was great reason to save his wainage, for otherwise the miserable creature was "to carry the burthen on his back." (Christian's Blackstone.)

(*s*) In the court leet and court baron it was performed by *affeerors*, or suitors sworn to *affeere*; that is, tax and moderate the general amercement, according to the particular circumstances of the offence and the offender. The affeelor's oath is conceived in the very terms of *Magna Charta*. As to which, Blackstone (vol. iv. p. 380) cites Fitz. Survey, c. 11.

(*t*) F. N. B. 76.

court(*u*), [it was then denominated a *fine*; and the antient practice was, when any such fine was imposed, to inquire by a jury, "*quantum inde regi dare valeat per annum, saluâ sustentatione suâ, et uxoris, et liberorum suorum* (*x*)."] And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay without touching the implements of his livelihood; but to inflict corporal punishment, or a limited imprisonment, instead of such fine as might amount to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms; because the penalty must otherwise fall upon a man's person, unless it be redeemed or ransomed by a pecuniary fine (*y*); according to an antient maxim, *qui non habet in crumenâ luat in corpore*. Yet, where any statute speaks both of fine and ransom, it is holden that the ransom shall be treble the fine at least (*z*).]

As to *imprisonment* (*a*), its measure, when imposed under modern Acts of parliament, is now usually limited so as not to exceed two years (*b*); but, in connection with it, the sentence frequently inflicts the additional severity of *hard labour* (*c*), or of *solitary confinement*, or both, accord-

(*u*) 8 Rep. 40. The words of Blackstone are—"a stranger, not "being party to any suit"—(4 Bl. Com. 380); but Lord Coke says, "a "stranger to the court."

(*x*) Gilb. Excheq. c. 5.

(*y*) *Mirroure*, c. 5, s. 3; Lamb. *Eirenarch*. 575.

(*z*) Norton's case, Dyer, 232.

(*a*) As to prisons and their regulation, vide sup. vol. III. p. 233 et seq. It may be observed that persons under the age of sixteen, convicted of any offence before any court, magistrate, or justice of the peace, and whose sentence shall include imprisonment for, at the least, fourteen days,—may be ordered to be detained, after the period of imprisonment, in a *reformatory school*

for a period not less than two or more than five years. (As to these schools, vide sup. vol. III. p. 223.) See also 4 Geo. 4, c. 64, and 25 & 26 Vict. c. 44, enabling the visiting justices of gaols to direct pecuniary relief, in certain cases, to be afforded to prisoners on leaving prison, through the medium of a certified *Discharged prisoners' aid society*.

(*b*) See 24 & 25 Vict. cc. 96, 97, 98, 99, 100, *passim*. By some earlier statutes, however, still in force, the periods of imprisonment authorized for offences under them respectively, are sometimes three and even four years.

(*c*) The punishment of *hard labour* is said to have been first introduced by 5 Ann. c. 6. (See *R. v. Baker*,

ing to the nature of the case. By 7 Will. IV. & 1 Vict. c. 90, s. 5, it is however provided, that from thenceforth it shall not be lawful for any court to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year (*d*). Imprisonment, even where not the regular punishment, may sometimes be inflicted, in capital cases, by way of commutation for the punishment of death. For by 11 Geo. IV. & 1 Will. IV. c. 39, s. 7, in cases where the Crown shall extend mercy to a capital offender, on condition of imprisonment with or without hard labour, the court, or any judge of the courts at Westminster, to whom the intention shall be signified, shall allow the offender the benefit of a conditional pardon, and make an order for the imprisonment accordingly.

As to *whipping*, the offender, under such modern Acts of parliament as authorize this punishment (*e*), may be directed to be whipped in addition to any imprisonment awarded. By 1 Geo. IV. c. 57, however, judgment shall in no case be given, that any *female* convicted of any offence, shall be whipped either publicly or privately: and in cases where the whipping of female offenders had, before that Act, formed either a part or the whole of the sentence,—the court or justice of the peace is empowered to pass sentence of confinement to hard labour in the common gaol or house of correction, for any time not exceeding six months, or less than one month; (or of solitary confinement therein, for any space not exceeding seven days at any one time;) in lieu of the sentence of being publicly or privately whipped. Moreover, by the Criminal Consolidation Acts of 1861, already so often referred to, the addition of whipping by them authorized in reference

7 A. & E. 502.) Hard labour may now be added, in most cases, to the sentence of imprisonment. See 24 & 25 Vict. c. 96, 97, 98, 99, 100, *passim*.^(c)

(*d*) A similar limitation as to the period of solitary confinement, in

reference to the offences punishable under them respectively, is inserted in each of the Acts of the present reign cited in the last note.

(*e*) Vide sup. p. 517, n. (*e*), p. 528, *infra* (1).

to a variety of the offences therein mentioned, is uniformly confined to males below the age of *sixteen* (*f*); and the whipping is to be in private and only to be inflicted *once*; and the number of strokes and the instrument with which they are to be inflicted, are to be specified by the court in the sentence. And a similar provision is made by 25 & 26 Vict. c. 18, in reference to this punishment when awarded by a justice or justices in the exercise of his or their *summary jurisdiction*,—with the addition, *that, in case of an offender whose age does not exceed fourteen years, the number of strokes inflicted shall not exceed twelve, and the instrument used shall be a birch rod.*

As to *penal servitude*, this is a sentence which has been very recently introduced in substitution for that of *transportation beyond the seas* (*g*). The principal statute in reference to such transportation is the 5 Geo. IV. c. 84 (*h*), by which the law on that subject was revised and consolidated in the year 1824. Under this Act, the sovereign is enabled, by and with the advice of the Privy Council, to appoint places beyond the seas, either within or without the dominions of the Crown, to which offenders under sentence of transportation may be conveyed and kept to hard labour; and also, under the royal sign-manual, to appoint places of confinement in England or Wales, for the confinement of convicts under sentence of transportation, until they are transported or become entitled to their

(*f*) See 24 & 25 Vict. cc. 96, 97, 98, 99, 100, *passim*. In one instance (24 & 25 Vict. c. 96, s. 101), the age mentioned is *eighteen*; but this is probably a clerical error.

(*g*) As to transportation, Blackstone remarks (vol. iv. p. 401) that it is "allowable and warranted by the Habeas Corpus Act, 31 Car. 2, c. 2, s. 14." It is said (Barr. on Statutes, 352) to have been first inflicted as a punishment by 39

Eliz. c. 4. As to its history, see R. v. Baker, 7 A. & E. 502; Bullock v. Dodds, 2 B. & Ald. 262, 267; Whitehead v. The Queen, 7 Q. B. 532.

(*h*) This Act is amended by 6 Geo. 4, c. 69; 11 Geo. 4 & 1 Will. 4, c. 39; 2 & 3 Will. 4, c. 62; 4 & 5 Will. 4, c. 65; 7 Will. 4 & 1 Vict. c. 90; 6 & 7 Vict. c. 7; 10 & 11 Vict. c. 67; 16 & 17 Vict. c. 99, s. 7; 20 & 21 Vict. c. 3; 22 Vict. c. 25.

liberty, or shall be otherwise disposed of by order of the secretary of state. But great difficulty having arisen, of late years, in finding colonies willing to receive transported convicts, it became gradually the practice, as to certain classes of convicts who had been sentenced to transportation, to detain them in the mother-country, for the whole period of their term of punishment (*l*); and it was ultimately thought expedient to abolish the sentence of “transportation” altogether, and to substitute for it that of “penal servitude,” under which convicts may be subjected to such confinement and discipline (either at home or abroad) as shall be found practicable and desirable.

This change was accordingly carried into effect by 16 & 17 Vict. c. 99, and 20 & 21 Vict. c. 3; by the latter of which Acts, after providing that no person shall for the future be sentenced to transportation, it is enacted that any persons who, if those Acts had not passed, might have been sentenced to transportation, shall be liable to be sentenced to be kept in *penal servitude* for a term of the same duration; and that where the court before which the offender shall be convicted, would formerly have had discretion to award one of any two or more terms of transportation, it shall now have the like discretion to award one of any two or more of the terms of penal servitude authorized to be awarded, instead of transportation: and further, that any person who might have been sentenced *either* to transportation or imprisonment, may be sentenced either to penal servitude or to imprisonment;—that where seven years’ transportation might have been awarded, the court may award penal servitude for not less than three years;—and that where, in any enactment still in force, the expression “any crime punishable with transportation,” or “any crime punishable by law with

(*l*) See the Evidence of Mr. Waddington, before the select committee, of the House of Commons, on Transportation. (Second Report, p. 3.)

transportation," or any expression of the like import, is used, the enactment shall be construed and take effect as applicable also to any offence punishable with penal servitude (*m*).

The same Acts also provide, that every person sentenced to be kept in penal servitude may be confined in any prison or place of confinement in any part of the united kingdom, or in any river, port, or harbour thereof,—or in any part of her Majesty's dominions beyond the seas, or in any ports or harbours thereof, duly appointed for such purpose by order in Council,—as one of her Majesty's principal secretaries shall from time to time direct; and may be kept to hard labour and otherwise dealt with, as persons sentenced to transportation might formerly be dealt with while so confined (*n*).

By the said Acts it is further provided, that it shall be lawful for her Majesty, by order in writing, under the hand and seal of a principal secretary of state, to grant to any convict sentenced to be kept in penal servitude, or to be imprisoned, a *licence to be at large* (*o*) in the united kingdom and the channel islands, or in such part thereof respectively as shall be expressed in the licence, during

(*m*) 20 & 21 Vict. c. 3, s. 6.

(*n*) 16 & 17 Vict. c. 99, s. 6; 20 & 21 Vict. c. 3, s. 3. The convict prisons in England are specified, *sup.* vol. III. p. 240, n. (*q*). As to the convict establishments at Bermuda or Gibraltar, or other places beyond seas, see 22 Vict. c. 25. By the Report of the Directors of Convict Prisons (1862), it appears that during the year 1861, 225 convicts in confinement in England under sentence of penal servitude, were removed to Western Australia, and 304 to Gibraltar (pp. 122, 164, 241).

(*o*) 16 & 17 Vict. c. 99, s. 9; 20 & 21 Vict. c. 3, s. 5. Under the authority of a circular from the

secretary of state, dated 27 June, 1857, a prisoner sentenced to penal servitude is informed on arriving at prison, that he will, by good conduct while undergoing this sentence, be enabled to obtain his liberty under a "licence to be at large," at a certain fixed time before the expiration of the period for which he has been sentenced,—varying according to the number of years for which he has been sentenced. But if he has been sentenced to penal servitude *for life*, remission can only take place by order of the secretary of state, if the special circumstances of the case appear to warrant any indulgence.

such portion of his term, and on such conditions in all respects, as to her Majesty shall seem fit (*n*); and that such licence may be revoked or altered at pleasure; and that if revoked the convict may be forthwith apprehended, and recommitted to the prison from which he was released by virtue of his licence, or to any other prison in which convicts under sentence of penal servitude may be lawfully confined (*o*).

Moreover, persons under sentence of penal servitude may be removed from the prisons in which they are severally confined, to any other prison or penitentiary in Great Britain, there to be confined for such time as her Majesty, by order in writing from a principal secretary of state, shall direct, not exceeding the time for which they might have been lawfully confined in the prisons from which they shall have been severally removed (*p*).

When sentence of *death*, the most terrible judgment in the laws of England, is pronounced, the mode in which it is to take place is particularized in the sentence itself, and is always that the prisoner be hanged by the neck till dead (*q*); a mode of capital punishment that has been in use in this country from time immemorial (*r*).

(*n*) 16 & 17 Vict. c. 99, s. 9. As to the power of felons holding licences to be at large, or "tickets of leave," to acquire *personal* property, but not, in general, *lands*, see 5 Geo. 4, c. 84, s. 26; 6 & 7 Vict. c. 7; 20 & 21 Vict. c. 3. See also on this subject, *Bullock v. Dodds*, 2 B. & Ald. 258.

(*o*) 16 & 17 Vict. c. 99, ss. 10, 11; 20 & 21 Vict. c. 3, s. 5.

(*p*) 10 & 11 Vict. c. 67; 16 & 17 Vict. c. 99, s. 7.

(*q*) 2 Hale, P. C. 399; Hawk. P. C. b. 2, c. 48, s. 7. This is now the universal mode. In treason, however, as we have seen (vide sup. p. 247), it is accompanied with other severities; and the case was

formerly the same with murder (as to which, vide sup. p. 158). Nor did hanging in former times always form part of the sentence. For when a woman was convicted of treason, or petit treason, the sentence was that of being burned to death (vide sup. p. 161). And the judgment for counterfeiting the coin of this kingdom of the Great Seal, in the case of females, was, at one time, to be drawn and burnt; and, in the case of a male offender, to be drawn and hanged. (1 Hale, P. C. 351.)

(*r*) Lord Coke says that before the reign of Henry the first, the judgment for felony was not always one; but that monarch ordained in

Upon the passing of this sentence [the immediate inseparable consequence from the common law, is *attainder* (*s*). For when it is now clear beyond all dispute that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster, and a bane to human society, the law sets a note of infamy upon him;] calls him [attaint, *attinctus*, stained or blackened;] withdraws from him in general all civil rights; and considers him, [by an anticipation of his punishment,] as [already dead in law (*t*). This is after *judgment*; for there is great difference between a man *convicted* and *attainted*—though they are frequently through inaccuracy confounded together. After conviction only, a man is liable to none of these disabilities; for there is still, in contemplation of law, a possibility of his innocence,] as something may be offered in arrest of judgment. [But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of anything to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences (*u*):—or upon such circumstances as are equivalent to judgment of death,—as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice; which tacitly confesses the guilt. And, therefore, either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.]

Among [the consequences of attainder are *forfeiture* and *corruption of blood*.]

I. Forfeiture of lands and tenements upon attainder, accrues in treason and other felonies (*x*). First as to *treason*. [By attainder in treason a man forfeits for ever to the Crown all his lands and tenements of inheritance,] of

parliament, that it should be “to be hanged,” as above, for all manner of felonies. (3 Inst. 53.)

(*s*) See as to this, sup. vol. i. p. 444 et sup.

(*t*) 3 Inst. 213.

(*u*) R. v. Bridger, 1 Mee. & W. 145.

(*x*) Vid. sup. vol. i. p. 447.

freehold tenure, [whether fee simple or fee tail (*a*); and all his rights of entry on lands and tenements,] of such tenure, [which he had, at the time of the offence committed, or at any time afterwards, to be for ever vested in the Crown; and also the profits of all land and tenements] of such tenure, [which he had in his own right for life or years, so long as such interest shall subsist (*a*).

This forfeiture relates backwards to the time of the treason committed: so as to avoid all intermediate sales and incumbrances, but not those before the fact (*b*); and therefore a wife's jointure is not forfeitable for the treason of her husband, because settled on her previous to the treason committed; but her dower is forfeited by the express provision of statute 5 & 6 Edw. VI. c. 11 (*c*). And yet the husband shall be tenant by the curtesy of the wife's lands, if the wife be attainted of treason (*d*); for that is not prohibited by the statute. But though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits: and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands, for he never was attainted of treason (*e*). But if the chief justice of the king's bench, (the supreme coroner of all England,) in person, upon the view of the

(*a*) *Copyhold* estates, by attainder either on treason or felony, are forfeited to the lord of the manor, and not to the Crown, except by the express words of an act of parliament. (2 Vent. 39; Hard. 431; 2 Jon. 189; Pol. 621; Skin. 8.)

(*a*) Co. Litt. 392; 3 Inst. 19; 1 Hale, P. C. 240; Hawk. P. C. b. 2, c. 49. As to the effect of the attainder of *trustees* or *mortgagees* in respect of the property vested in them, *vide sup.* vol. I. p. 451.

(*b*) 3 Inst. 211.

(*c*) Counterfeiting the coin of the realm was formerly treason; but by some of the statutes constituting the offence, 5 Eliz. c. 11, 18 Eliz. c. 1, 8 & 9 Will. 3, c. 26, 15 Geo. 2, c. 28, it was provided, that it should work no forfeiture of lands except for the life of the offender; and by all, that it should not deprive the wife of her dower.

(*d*) 1 Hale, P. C. 359.

(*e*) Co. Litt. 13.

[body of one killed in open rebellion, records it, and returns the record into his own court, both lands and goods shall be forfeited (*f*).

With us in England forfeiture of lands and tenements to the Crown for treason, is by no means derived from the feudal policy, but was antecedent to the establishment of that system in this island, being transmitted from our Saxon ancestors, and forming a part of the antient Scandinavian constitution.] It is based indeed on natural justice.

[The natural justice of forfeiture or confiscation of property for treason is founded in this consideration,—that he who hath thus violated the fundamental principles of government, and broken his part of the original contract

(*f*) 4 Rep. 57. It was enacted by 7 Ann. c. 21, that after the decease of the then Pretender no attainder for treason should extend to the dis-inheriting of any heir, nor to the prejudice of any person other than the traitor himself. The history of this matter is somewhat singular, and worthy of observation. Blackstone's account of it (vol. iv. p. 384) is as follows: "At the time of the Union, the crime of treason in Scotland was, by the Scots law, in many respects different from that in England; and particularly in its consequence of forfeitures of entailed estates, which was more peculiarly English: yet it seemed necessary that a crime so nearly affecting government should, both in its essence and consequences, be put upon the same footing in both parts of the united kingdom. In new modelling these laws, the Scotch nation and the English house of commons struggled hard, partly to maintain, and partly to acquire, a total immu-

nity from forfeiture and corruption of blood: which the house of lords as firmly resisted. At length a compromise was agreed to, which is established by this statute, viz. that the same crimes, and no other, should be treason in Scotland that are so in England; and that the English forfeitures and corruption of blood should take place in Scotland till the death of the then Pretender, and then cease throughout the whole of Great Britain; the lords artfully proposing this temporary clause in hopes, it is said, that the prudence of succeeding parliaments would make it perpetual." (See Burnet's Hist. A.D. 1709; and "Considerations on the Law of Forfeiture," vol. i. p. 244.) This was partly done by the statute 17 Geo. 2, c. 39, made in the year preceding the rebellion of 1745. And by 39 & 40 Geo. 3, c. 93, the above mentioned provision of the stat. 7 Ann. c. 21, was repealed.

[between king and people, hath abandoned his connections with society, and hath no longer any right to those advantages which before belonged to him purely as a member of the community; among which social advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures, moreover, whereby his posterity may suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation he has, to keep him from offending: according to that beautiful sentiment of Cicero, "*nec vero me fugit quam sit uerbis, parentum scelera filiorum pœnis lui; sed hoc præclare legibus comparatum est, ut caritas liberorum amiciores parentes reipublicæ redderet*" (g). And therefore Aulus Cascellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for despising the power of the tyrants, his old age and his want of children; for children are pledges to the prince, of the father's obedience (h). Yet many nations have thought that this posthumous punishment savours of hardship to the innocent, especially for crimes that do not strike at the very root and foundations of society, as treason against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius, in every other instance but that of treason, thought it more just, "*ibi esse pœnam, ubi et noxa est;*" and ordered that "*peccata suos teneant auctores, nec ulterius progrediatur metus, quam reperiatur delictum*" (i). And Justinian, also, made a law to restrain the punishment of relations (h); which directs the forfeiture to go, except in the case of *crimen majestatis*, to the next of kin to the delinquent. On the other hand, the Macedonian laws extended even the capital punishment of treason, not only to the children, but to all the relations of the

(g) *Ad Brutum*, ep. 12.(h) *Gravin.* 1, s. 68.(i) *Cod.* 9, 47, 22.(k) *Nov.* 134, c. 13.

[traitor (*l*); and of course their estates must also be forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle (*m*), copied almost *verbatim* from Justinian's code (*n*), the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor's *particular bounty*. But they are deprived of all their effects and rights of succession, and are rendered incapable of any honour, ecclesiastical or civil, "to the end that, being always poor and necessitous, "they may for ever be accompanied by the infamy of "their father; may languish in continual indigence; and "may find," says this merciless edict, "their punishment "in living, and their relief in dying."]

Secondly, as to *other felonies*. By attainder on felony, other than treason, the offender forfeits to the Crown the profits of all his freehold lands and tenements during his life; and in the case of *murder*, he forfeits, besides, all lands and tenements which he had in fee simple, for a year and a day, with power to the Crown of committing upon them what waste it pleases: subject to which temporary forfeiture they escheat to the lord of the fee, by reason of the tenant's corruption of blood, as will be presently explained (*o*). This doctrine of *year, day and waste* applied, until recently, to attainder for any felony whatever, with the exception of treason (*p*), which, as we have seen, is differently provided for; and the history of it is as follows. [Formerly the sovereign had only a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing

(*l*) Qu. Curt. l. 6.

(*m*) Cap. 24.

(*n*) L. 9, t. 8, l. 5.

(*o*) Vide post, p. 543. It will be recollected that the ultimate lord of the fee in all cases, and usually the immediate lord also, is (since the statute of *Quia Emptores*) the sovereign

(vide sup. vol. I. p. 239). In such cases, therefore, the Crown, on attainder for *murder* (as well as for treason), takes the *whole* of the offender's estate (vide sup. vol. I. p. 446).

(*p*) 2 Inst. 37.

[their meadows, and cutting down their woods. And a punishment of a similar spirit appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus, in the books of Daniel (*q*), and Ezra (*r*); which, besides the pain of death inflicted on the delinquents there specified, ordain “that their houses shall be made a dunghill.” But this tending greatly to the prejudice of the public, it was agreed in the reign of Henry the first, in this Kingdom, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit (*s*). And, therefore, *Magna Charta* provides that the king shall only hold such lands for a year and a day, and then restore them to the lord of the fee, without any mention made of waste (*t*). But the statute 17 Edw. II., *De prærogativâ regis*, seems to suppose that the king shall have his year, day *and* waste, and not the year and day *instead of* waste; which Sir Edward Coke and the author of the *Mirroure* before him, very justly look upon as an encroachment, though a very antient one, of the royal prerogative (*u*).] And such continued to be the state of the law on this subject until the passing of the 54 Geo. III. c. 145, though it was the practice to compound for the year, day and waste, to prevent the Crown from exercising its right of entry. But now by the statute just mentioned, no attainder for felony which shall thereafter take place, (except in cases of *treason* or *murder*, or of abetting, procuring or counselling the same,) shall extend to the disinheritation of any heir, nor to the prejudice of the right or title of any person other than the right or title of the offender during his life only; and it shall be lawful to every person to whom the right or interest of any lands, tenement or hereditaments after the death of

(*q*) Ch. iii. 29.(*r*) Ch. vi. 11.(*s*) *Mirr.* c. 4, s. 16; *Flet.* l. 1,

c. 28.

(*t*) 9 Hen. 3, c. 22.(*u*) *Mirr.* c. 5, s. 2; 2 Inst. 37.

such offender should or might have appertained, if no such attainder had been, to enter into the same.

The forfeitures above mentioned all arise, it will be observed, only as consequences of attainder (x); [and therefore a *felo de se* forfeits no lands of inheritance or freehold, for he never is attainted as a felon (y).] But these forfeitures, on the other hand, [relate back to the time of the offence committed, so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged with the offender; but the cruelty and reproach must lie on the part, not of the law, but of the criminal, who has thus knowingly and dishonestly involved others in his own calamities.]

It is to be observed too, that the forfeitures above mentioned [are all the forfeitures of real estates created by the common law, as consequential upon attainders, by judgment of death or outlawry. The particular forfeitures created by the statutes of *præmunire* and others are here omitted, because they are to be looked upon rather as a *part* of the judgment and penalty inflicted by the respective statutes, than as *consequences* of such judgment, as in treason and murder they are. But as a part of the forfeiture of real estates, it may be proper just to mention the forfeiture of the profits of lands during life, which extends to two other instances besides those already spoken of,—misprision of treason (z); and striking in the superior courts of justice (a), or drawing a weapon upon a judge there presiding (b).]

II. Another immediate consequence of attainder in treason and murder [is the *corruption of blood*, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his

(x) R. v. Bridges, 1 Mee. & W. 145.

(y) 3 Inst. 55. See Norris v. Chambers, 30 L. J., Ch. 290.⁹

(z) 3 Inst. 218; vide sup. p. 250.

(a) The words of Blackstone are "striking in Westminster Hall."—

(4 Bl. Com. 386.) As to this offence, vide sup. p. 304.

(b) 3 Inst. 141.

[ancestors, nor retain those he is already in possession of, nor *transmit* them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the Crown's superior right of forfeiture.] But having had occasion to enlarge on this matter in a former volume, where the subject of *escheat* was in question (*b*), it is not necessary to detain the reader longer upon it in this place.

In addition however to the forfeitures of lands and tenements consequential on attainder, it is proper here to notice the forfeiture of *goods and chattels* (*real and personal*), which accrues to the Crown not only on attainder, but in felonies of all sorts, whether capital or otherwise (*c*), [For *flight* also, on an accusation of treason or felony (*d*), whether the party be found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels; for the very flight is an offence carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by the law.] But in modern times it has not been usual for the jury to find the flight (*e*); [forfeiture being looked upon, since the vast increase of personal property of late years, as too large a penalty for an offence to which a man is prompted by the natural love of liberty.] And now by statute 7 & 8 Geo. IV. c. 28, s. 5, it is enacted, that where any person shall be indicted for treason or felony, the jury impanelled to

(*b*) Vide sup. vol. I. p. 445 et seq.

(*c*) Vide post, p. 546, n. (*k*). Forfeiture of *goods and chattels* accrues, consequently, in *self-murder* (vide sup. p. 146), and in *misprision of treason* (vide sup. p. 250); and in the case of *striking or other outrage* in the superior courts of justice (vide sup. p. 304). While any distinction existed between grand and petit larceny, it also accrued in the latter offence (vide sup. p. 203). On the

other hand, a conviction for larceny by way of summary conviction, under the 10 & 11 Vict. c. 82, 13 & 14 Vict. c. 37, or 18 & 19 Vict. c. 126, is *not* to be attended by any forfeiture. (As to these Acts, vide sup. pp. 412, 413.)

(*d*) Blackstone adds, "or even petit larceny."

(*e*) Staundf. P. C. 183 b; 4 Bl. Com. 387.

try such person shall not be charged to inquire concerning his lands, tenements or goods, nor whether he fled for such treason or felony.

[There is a remarkable difference or two between the forfeiture of lands, and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before; goods and chattels are forfeited by *conviction* (*f*): because in many of the cases where goods are forfeited there never is any attainder, which happens only where judgment of death or outlawry is given; therefore in those cases the forfeiture must be upon conviction, or not at all; and, being necessarily upon conviction in those, it is so ordered in all other cases; for the law loves uniformity. 2. In outlawries for treason or felony, lands are forfeited only by the judgment; but the goods and chattels are forfeited by a man's being first put into the *exigent*, without staying till he is *quinto exactus*, or finally outlawed (*g*); for the secreting himself so long from justice is construed a flight in law (*h*). 3. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances; but the forfeiture of goods and chattels has no relation backwards; so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bonâ fide* sell any of his chattels, (real or personal,) for the sustenance of himself and family between the fact and conviction (*i*): for personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason

(*f*) See *Roberts v. Walker*, 1 Russ. & Myl. 756.

(*g*) As to the proceedings to outlawry, vide sup. p. 466.

(*h*) 3 Inst. 232.

(*i*) Hawk. P. C. b. 2, c. 49, s. 33.

Accordingly in the case of *Whittaker v. Wisbey*, 12 C. B. 44, a *bonâ fide* assignment after the commission day at the assizes, but before the day of trial, was held good.

[or felony. Yet if they be collusively and not *bonâ fide* parted with, merely to defraud the Crown, the law, and particularly the statute 13 Eliz. c. 5, will reach them; for they are all the while truly and substantially the goods of the offender (*k*).]

(*k*) It may be observed that, though in ordinary cases, the property of a felon vests in the *Crown*, yet this is subject to exception [vide sup. p. 538, n. (*z*)]. Blackstone also remarks (vol. i. p. 302), that “forfeitures in general may be granted by the sovereign to particular subjects as a royal franchise; and in deed are for the most part granted

“out to lords of manors, or other liberties, to the perversion of their original design.” In the city of London, the corporation, by virtue of antient charters, claims the right to the goods of all felons convicted within their jurisdiction. (See Pulling on the *Laws and Customs of London*, 2nd edit. p. 93.)

CHAPTER XXIV.

OF REVERSAL OF JUDGMENT.



[WE are next to consider how judgments, with their several connected consequences of attainder, forfeiture, and corruption of blood, may be set aside (*a*). There are two ways of doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A judgment may be falsified, reversed, or avoided, in the first place, *without a writ of error*; for matters foreign to or *dehors* the record, that is, not apparent upon the face of it, so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself.] For example, [where a commission issues to A. and B. and twelve others, or any two of them, of which A. or B. shall be one, to take and try indictments, and any of the other twelve proceed without the interposition or presence of either A. or B.; in this case all proceedings, trials, convictions and judgments against any person are void for want of a proper authority in the commissioners, and may be falsified] in any other cause or court [upon bare inspection, without the trouble of a writ of error (*b*),—it being a high misdemeanor in the judges so proceeding, and little, (if anything,) short of murder in them all, in case any person] on such a judgment [be executed and suffer death. So likewise if a man purchases land of another, and afterwards the vendor is, either by outlawry or his own confession, convicted and attainted of treason or felony previous to the sale or alienation, whereby such

(*a*) Vide sup. p. 424.

(*b*) Hawk. P. C. b. 3, c. 50, ss. 2, 3.

[land becomes liable to forfeiture or escheat; now, upon any trial, the purchaser is at liberty, without bringing any writ of error, to falsify not only the time of the felony or treason supposed, but the very point of the felony or treason itself; and is not concluded by the confession or the outlawry of the vendor; though the vendor himself is concluded, and not suffered now to deny the fact, which he has by confession or flight acknowledged. But if such attainder of the vendor was by verdict on the oath of his peers, the alienage cannot be received to falsify or contradict the *fact* of the crime committed; though he is at liberty to prove a mistake in *time*, or that the offence was committed after the alienation, and not before (*b*).

Secondly, a judgment may be reversed *by writ of error*; which lies from all inferior criminal jurisdictions] to the Court of Queen's Bench (*c*), and from the Queen's Bench to the Court of Exchequer Chamber (*d*), and thence to the House of Peers; and may be brought for notorious and substantial mistakes in the judgment or other parts of the record; [as where a man is found guilty of perjury, and receives the judgment of felony.] But for merely *formal* defects, no writ of error can now be brought; it being provided (as we have seen), that all such shall be either immaterial, or, when still ground for objection, shall at least be brought forward by demurrer or motion to quash the indictment (*e*). It is also to be observed, that a writ of error is never allowed, even in case of a mere misdemeanor, as of course; but only [on sufficient pro-

(*b*) 3 Inst. 231; 1 Hale, P. C. 361.

(*c*) If the sentence appears to be erroneous, but the indictment valid, the prisoner must be discharged. (*R. v. Bourne*, 7 A. & E. 58.) As to writs of error sued out for the purpose of compromising a prosecution, see *Alleyne's case*, 1 Dearsley's

C. C. R. 505; 4 Ell. & Bl. 186.

(*d*) 11 Geo. 4 & 1 Will. 4, c. 70, s. 8. As to the Court of Exchequer Chamber, vide sup. vol. III. pp. 427, 428. As to its jurisdiction, and the practice therein, as a court of error in *criminal* cases, see *Mansell v. The Queen*, 8 Ell. & Bl. 85.

(*e*) Vide sup. p. 466.

[bale cause shown to the attorney-general](*f*): though, supposing such probable cause to appear, the writ is [understood to be grantable of common right, and *ex debito justitiæ* (*g*).] And by 8 & 9 Vict. c. 68—amended by 9 & 10 Vict. c. 24, and 16 & 17 Vict. c. 32 (*h*),—where judgment shall have been given for a misdemeanor, and the defendant shall have obtained a writ of error to reverse it, execution thereon shall be stayed, and the defendant discharged from imprisonment until such writ of error shall be finally determined; subject, however, to a proviso, that no execution shall be stayed, nor discharge take place, until the defendant shall be bound by recognizance, (with two sufficient surties,) to prosecute the writ of error with effect, and personally to appear in court on the day on which judgment thereon shall be given; and, in case the judgment be affirmed, forthwith to render himself to prison according to the judgment. As for writs of error to reverse judgment in capital cases, they are [only allowed *ex gratiâ*, and not without express warrant under the king's sign manual, or at least by the consent of the attorney-general (*i*). These therefore can rarely be brought by the party himself (*k*), especially where he is attainted for an offence against the state; but they may be brought by his heir or executor after his death, in more favourable times; which may be some consolation to his family.] In this case, however, the more effectual way, is [to reverse the attainder by Act of Parliament; which may be and hath been frequently done upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the Government, without examining too closely

(*f*) See *Ex parte Lees*, 1 Ell. Bl. & Ell. 828.

(*g*) See *Ex parte Newton*, 4 Ell. & Bl. 869; 16 C. B. 97.

(*h*) As to the recognizance required in error, see *Dugdale v. The*

Queen, 1 Dearsley's C. C. R. 254.

(*i*) 1 Vern. 170. 175.

(*k*) There occurred one recently, in the case of *Mansell v. The Queen*, 8 Ell. & Bl. 54.

[into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honours and estate, or some or one of them, by Act of Parliament; which, so far as it extends, has all the effect of reversing the attainder, without casting any reflections upon the justice of the preceding sentence.]

When the judgment is reversed upon a writ of error in any criminal case, the statute 11 & 12 Vict. c. 78, provides that it shall be competent to the court of error either to pronounce the proper judgment itself, or to remit the record to the court below, in order that that court may pronounce the proper judgment (*l*). And if the judgment be affirmed, or the writ quashed, then, by 16 & 17 Vict. c. 32, s. 4, the court of error may forthwith commit the defendant, if present, to the Queen's Prison (*m*): and by sect. 5 of the same Act, on its being made to appear to any one of the judges that the recognizances have been estreated, the judgment affirmed, or the writ quashed,—and that default has been made for the space of four days in rendering the defendant to prison,—such judge may issue his warrant for the apprehension of the defendant.

[The effect of falsifying or reversing an *outlawry* is, that the party shall be in the same plight as if he had appeared upon the *capias*; and if, it be before plea pleaded, he shall be put to plead to the indictment: if after conviction, he shall receive the sentence of the law; for all the other proceedings, except only the process of outlawry for his nonappearance, remain good and effectual as before. But when judgment pronounced upon *conviction* is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and

(*l*) As to the construction of this statute, see per Lord Campbell, in the case of *Holloway v. The Queen*,

17 Q. B. 327.

(*m*) Vide sup. vol. III. p. 239.

[his estates ; with regard to which last, though they be granted away by the Crown, yet the owner may enter upon the grantee with as little ceremony as he might enter upon a disseisor (*n*). But he still remains liable to another prosecution for the same offence ; for the first being erroneous, he never was in jeopardy thereby.]

(*n*) Hawk. P. C. b. 2, c. 50, s. 20.

CHAPTER XXV.

OF REPRIEVE AND PARDON.

[THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon (*a*); whereof the former is temporary only, the latter permanent.

.I. A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time: whereby the execution is suspended.]

This may be, in the first place, [*ex mandato regis*, that is, the mere pleasure of the Crown, expressed to the court by which execution is to be awarded (*b*).]

Again, there may be a reprieve [*ex arbitrio judicis*; either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or sometimes if any favourable circumstances appear in the criminal's character,—in order to give room to apply to the Crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commission expired: but this rather by common usage, than of strict right (*c*).

Reprieves may also be *ex necessitate legis*; as, where a woman is capitally convicted, and pleads her pregnancy:

(*a*) Vide sup. p. 424. It may deserve remark, that Blackstone, in this and the following chapter, is speaking chiefly of a judgment of death,—in his time (as observed in a former place) of far more frequent

occurrence than at the present day. (Vide sup. p. 105.)

(*b*)¹ Hale, P. C. 368; 2 Hale, P. C. 412; Hawk. P. C. b. 2, c. 51, s. 8.

(*c*) 2 Hale, P. C. 412.

[though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis*; and therefore no part of the bloody proceedings, in the reign of queen Mary, hath been more justly detested than the cruelty that was exercised in the island of Guernsey, of burning a woman big with child: and when, through the violence of the flames, the infant sprang forth at the stake, and was preserved by the by-standers, after some deliberation of the priests who assisted at the sacrifice, they cast it again into the fire as a young heretic (*d*). A barbarity which they never learned from the laws of *antient* Rome; which direct, with the same humanity as our own, "*quod prægnantis mulieris damnatæ pœna differatur, quoad pariat* (*e*):" which doctrine has also prevailed in England, as early as the first memorials of our law will reach (*f*). In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact; and if they bring in their verdict *quick with child*, (for, barely *with child*, unless it be alive in the womb, is not sufficient,) execution shall be stayed generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a further respite for that cause (*g*). For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice.

Another cause of regular reprieve is, if the offender become *non compos*, between the judgment and the award of execution (*h*):] for by the common law, on which, as formerly shown, some new provisions have now been engrafted by Act of Parliament, [though a man be *compos*

(*d*) Fox, Acts and Mon.

(*e*) Ff. 48, 19, 3.

(*f*) Flet. l. 1, c. 38.

(*g*) 1 Hale, P. C. 369.

(*h*) Ibid. 370.

[when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for "*furiosus solo furore punitur*," and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings (*h*). It is, therefore, an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege, why execution should not be awarded against him: and if he appears to be insane, the judge in his discretion may and ought to reprove him. Or, the party may *plead* in bar of execution; which plea may be either pregnancy, the royal pardon, an act of grace, or diversity of person; viz. that he is not the same that was attainted, and the like. In the last case a jury shall be impanelled to try this collateral issue,—as the identity of his person;—and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial shall be *instante* (*i*), and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted (*h*); neither shall any peremptory challenges of the jury be allowed the prisoner (*l*); though formerly such challenges were held to be allowable, wherever a man's life was in question (*m*).

II. If neither pregnancy, insanity, non-identity, nor other plea will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the sovereign's most gracious *pardon*; the granting of which is the most amiable prerogative of the Crown. Law, says an able writer, cannot be framed on principles of compassion to guilt: yet justice, by the constitution of

(*h*) Vide sup. p. 111.

(*i*) *R. v. Corbet*, 1 Sid. 72.

(*k*) *Fost.* 42.

(*l*) *R. v. Okey*, 1 Lev. 61; *Fost.*

42, 461.

(*m*) *Staundf. P. C.* 163; *Co. Litt.* 157; *Hal. Sum.* 259.

[England, is bound to be administered in mercy: this is promised by the sovereign in his coronation oath; and it is that act of his government; which is the most personal, and most entirely his own (*n*). The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is mercy. His power of pardoning was said, by our Saxon ancestors, to be derived *a lege suæ dignitatis* (*o*); and it is declared in parliament, by statute 27 Henry VIII. c. 24, that no other person hath power to pardon or remit any treason or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm (*p*).

This is indeed one of the great advantages of monarchy, in general, above any other form of government, that there is a magistrate who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment. Pardons, (according to some theorists,) should be excluded in a perfect legislation, where punishments are mild but certain: for the clemency of the prince seems a tacit disapprobation of the laws (*q*). But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter (*r*); or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender, though they alter not the essence of the crime, ought to make no distinction in the punishment. In democracies, however, this power of pardon can never subsist; for there, nothing higher is acknowledged than the

(*n*) Law of Forfeiture. 99.

(*o*) Wilk. Leg. Ang. Sax. LL. Edw. Conf. c. 18.

(*p*) It is observable that this power belongs only to a king *de*

facto, and not to a king *de jure* during the time of usurpation. (Bro. Abr. t. Charter de Pardon, 22.)

(*q*) Beccar. c. 20.

(*r*) Ibid. c. 4.

[magistrate who administers the laws; and it would be impolitic for the power of judging and of pardoning to centre in one and the same person. This, as the president Montesquieu observes, would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell whether a prisoner were discharged by his innocence, or obtained a pardon through favour (*s*). But, in monarchies, the sovereign acts in a superior sphere; and though he regulates the whole government as the first mover, yet he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislature, magnificence, or compassion. To him, therefore, the people look up as the fountain of nothing but bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear him to his subjects; and contribute more than anything to root in their hearts that filial affection and personal loyalty, which are the sure establishment of a prince.

Under this head of pardons let us briefly consider—First, the *subject* of pardon. Secondly, the *manner* of pardoning. Thirdly, the method of *allowing* a pardon. Fourthly, the *effect* of such pardon when allowed.

And, first, the sovereign may pardon all offences merely against the Crown or the public, excepting—1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm, is by the Habeas Corpus Act, 31 Car. II. c. 2, made a *præmunire*, unpardonable even by the king. Nor—2. Can the king pardon, where private justice is principally concerned in the prosecution of offenders; “*non potest rex gratiam facere cum injuriâ et damno aliorum*” (*t*). Upon this principle [he cannot pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it; though afterwards he may

(*s*) Sp. L. b. 6, c. 5.

(*t*) 3 Inst. 236.

[remit the fine : because though the prosecution is vested in the king to avoid multiplicity of suits, yet, during its continuance, this offence savours more of the nature of a *private* injury to each individual in the neighbourhood, than of a *public* wrong (*u*).] It may be noticed, that by 22 Vict. c. 32, her Majesty is now expressly enabled to remit, wholly or in part, any sum of money which under any Act may be imposed upon a convicted offender, although such money may be wholly or in part payable to some party other than the Crown ; and, if such offender has been imprisoned in default of payment, may nevertheless extend to him the royal mercy (*x*).

[There is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments, viz. that the king's pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of Charles the second, the Earl of Danby was impeached by the house of commons of high treason and other misdemeanors, and pleaded the king's pardon in bar of the same, the commons alleged, "that there was no precedent that ever any
" pardon was granted to any person impeached by the
" commons of high treason, or other high crimes, *depend-*
" *ing the impeachment* (*y*);" and thereupon resolved, "that
" the pardon so pleaded was illegal and void, and ought
" not to be allowed *in bar* of the impeachment of the com-
" mons of England (*z*);" for which resolution they assigned this reason to the house of lords ; "that the setting up a
" pardon to be a *bar* of an impeachment defeats the whole
" use and effect of impeachments; for should this point be
" admitted or stand doubted, it would totally discourage
" the exhibiting any for the future, whereby the chief

(*u*) Hawk. P. C. b. 2, c. 37, s. 33.

(*x*) See also 24 & 25 Vict. c. 96, s. 109, c. 97, s. 67, as to the remission of penalties imposed on a

summary conviction, for offences made so punishable under those Acts.

(*y*) Com. Journ. 28 April, 1679.

(*z*) Ibid. 5 May, 1679.

[“ institution for the preservation of the government would “ be destroyed (a).” And soon after the revolution, the commons renewed the same claim, and voted “ that a pardon is not *pleadable in bar* of an impeachment (b):” and at length it was enacted by the Act of Settlement, 12 & 13 Will. III. c. 2, “ that no pardon under the Great Seal of “ England shall be *pleadable* to an impeachment by the “ commons in parliament.” But after the impeachment has been solemnly heard and determined, it is not understood that the king’s royal grace is further restrained or abridged ; for after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the Crown, and at length received the benefit of the king’s most gracious pardon (c).

(a) Com. Journ. 26 May, 1679.

(b) Ibid. 6 June, 1689.

(c) The following remarkable record, in which it is both acknowledged by the commons and asserted by the sovereign,—proves that the king’s prerogative to pardon delinquents convicted in impeachments is as antient as the constitution itself.

“ Item prie la commune a nostre dit seigneur le roi, que nul pardon soit grante a nully persone, petit ne grande, q’ont este de son conseil et serementex, et sont empeschez en cest present parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des terres, tenemenz, biens, ou chateaux, lesquelz sont ou serront trovez en aucun defaut encontre leur ligeance, et la tenure de leur dit serement ; mais q’ils ne serront jammes conseillers ne officers du roi, mais en tout oustes de la courte le roi et de conseil as tous jours. Et sur ceo soit en present parlement fait estatut s’il plect au roi, et de tous autres en temps a venir en cas semblables, pur profit du roi et de roialme.

“ Responsio: Le roi ent fra sa vo-

lente, come mieltz lui semblera.”—Rot. Parl. 50 Edw. 3, n. 188.

After the lords have delivered their sentence of guilty, the commons have the power of pardoning the impeached convict, by refusing to demand judgment against him ; for no judgment can be pronounced by the lords till it is demanded by the commons. Lord Macclesfield was found guilty without a dissenting voice in the house of Lords ; but when the question was afterwards proposed in the house of commons, *that this house will demand judgment of the lords against Thomas earl of Macclesfield*, it occasioned a warm debate, but (the previous question being first moved) it was carried in the affirmative by a majority of 136 voices against 65. (Comm. Journ. 27 May, 1725 ; 6 H. St. Tr. 762.) In the impeachment of Warren Hastings it was decided, after much serious and learned investigation and discussion, by a very great majority in each house of parliament, that an impeachment was not abated by a dissolution of the

[Secondly, as to the *manner* of pardoning. 1. First, it must be under the Great Seal,] or warrant under the Sign-manual. A warrant, indeed, under the privy seal or sign-manual was formerly held not competent to confer a complete irrevocable pardon (*d*). But now by 7 & 8 Geo. IV. c. 28, s. 13, where the Crown shall be pleased to extend the royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under the royal sign-manual, (counter-signed by one of his principal secretaries of state,) shall grant to such offender either a free or conditional pardon; the discharge of such offender out of custody, in the case of a free pardon, and the performance of the condition, in the case of a conditional pardon, shall have the effect of a pardon under the Great Seal for such offender, as to the felony for which such pardon shall be granted; subject, however, to a proviso, that such discharge or performance shall have no effect to prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction, for any felony committed after the granting of any such pardon (*e*). There may also be a constructive pardon without any seal or sign-manual, and by the mere endurance of the appropriate punishment. For, by 9 Geo. IV. c. 32, s. 3,—reciting that it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged,—it is enacted, that where any offender shall be convicted of any felony not punishable with death, and shall endure the punishment to which he hath been adjudged for the same, the punishment so endured shall have the like effects and conse-

parliament; though almost all the legal characters of each house voted in the minorities.

(*d*) 4 Bl. Com. 400. Blackstone cites 5 St. Tr. 166, 173.

(*e*) As to the pardon of offenders on condition of *penal servitude*, see 5 Geo. 4, c. 84, s. 2; 6 Geo. 4, c. 25, s. 1; 6 & 7 Vict. c. 7; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

quences as a pardon under the Great Seal, as to the felony whereof the offender was so convicted; subject, however, to a proviso, that it shall not prevent or mitigate any punishment to which he might otherwise be lawfully sentenced, on a subsequent conviction for any other felony. 2. [Next, it is a general rule, that whenever it may reasonably be presumed the king is deceived, the pardon is void (*f*). Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed (*g*). 3. General words have also a very imperfect effect in pardons. A pardon of "all felonies," will not pardon a conviction or attainder of felony, (for it is presumed the king knew not of those proceedings;) but the conviction or attainder must be particularly mentioned (*h*). And it has been held, that a pardon of *felonies* will not include piracy (*i*); for that is no felony punishable at the common law,] having been cognizable only in the Court of Admiralty, until brought within the jurisdiction of the ordinary courts by Act of Parliament (*k*). 4. [It is also enacted by statute 13 Rich. II. st. 2, c. 1, that no pardon for treason, murder, or rape, shall be allowed, unless the offence be particularly specified therein; and, particularly in murder, it shall be expressed whether it was committed by lying in wait, assault or malice prepense. Upon which Sir Edward Coke observes, that it was not the intention of the parliament, that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive

(*f*) Hawk. P. C. b. 2, c. 37, s. 8.

(*g*) 3 Inst. 238; Hawk. P. C. b. 2, c. 37, s. 46.

(*h*) Hawk. ubi sup. s. 8. Hawkins says (ubi sup. s. 9), that it is taken for granted in many books, that felonies in general (exclusive of treason, murder, and rape), may be pardoned under the general words "all felo-

nies;" but he holds this doctrine to be doubtful, and says that general pardons are commonly made by Act of Parliament, and have been rarely granted by the Crown.

(*i*) Hawk. P. C. b. 1, c. 37, s. 6; b. 2, cf 37, s. 11; Co. Litt. 391 a; 3 Inst. 112.

(*k*) Vide sup. p. 300.

[it possible that the king would ever excuse an offence by name, which was attended with such high aggravations (*l*).] Yet pardons for such murders have been frequently granted since that period, and even under the general description of a felonious killing; there being always inserted therein, until the time of the revolution, a *non obstante* of the statute of king Richard (*m*). But it being declared by the Bill of Rights, 1 W. & M. sess. 2, c. 2, that no dispensation by *non obstante* of any statute shall be thenceforth allowed, such general description would now seem to be insufficient (*n*). [Under these and a few other restrictions, it is a general rule, that a pardon shall be taken most beneficially *for* the subject and most strongly *against* the king (*o*).

A pardon may also be *conditional*; that is, the king may extend his mercy upon what terms he pleases, and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend, and this by the common law (*p*); which prerogative is exerted in the pardon] of a capital offender, on condition of imprisonment with or without hard labour for a stated time (*q*), or of penal servitude for life, or for a term of years (*r*).

(*l*) 3 Inst. 236.

(*m*) Hawk. P. C. b. 2, c. 37, s. 17.

It was once made a question, whether murder can be the subject of a pardon under any form of words; and to this point the statutes 6 Edw. 1, st. 1, c. 9; 2 Edw. 3, c. 2, and 14 Edw. 3, st. 1, c. 15, have been cited. But it is now settled that the pardon of murder is as much within the prerogative of the Crown, as the pardon of any other offence. (*R. v. Parsons*, 1 Show. 283; 2 Salk. 499; 4 Mod. 61; 3 Inst. 236; Hawk. P. C. b. 2, c. 37, s. 14.)^o

(*n*) Hawk. P. C. b. 2, c. 37, s. 17.

(*o*) 4 Rep. 49 b.

(*p*) Hawk. P. C. b. 2, c. 37, s. 45.

(*q*) Vide sup. p. 532.

(*r*)^o By 5 Geo. 4, c. 84, it is enacted, that whenever the crown shall be pleased to extend mercy to an offender convicted of a capital crime on condition of his transportation beyond the seas, such offender shall be allowed the benefit of a conditional pardon, and an order shall be made by the court for his immediate transportation. And by 20 & 21 Vict. c. 3, whenever mercy shall be so extended on condition of his being kept in *penal servitude*, such extension of mercy shall have the same effect, as formerly in the case of the

Thirdly, [with regard to the manner of *allowing* pardons, we may observe, that a pardon by Act of Parliament is more beneficial than by the king's charter; for a man is not bound to plead it, but the court must *ex officio* take notice of it (*q*); neither can he lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon (*r*). The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading not guilty, he has waived the benefit of such pardon (*s*). But if a man avails himself thereof, as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment, or in bar of execution. Antiently, by stat. 10 Edw. III. c. 2, no pardon of felony could be allowed unless the party found sureties for his good behaviour, before the sheriff and coroners of the county (*t*). But that statute is repealed by the statute 5 & 6 W. & M. c. 13; which, instead thereof, gives the judges of the court a discretionary power to bind the criminal, pleading such pardon, to his good behaviour, with two sureties, for any term not exceeding seven years.

Fourthly, the *effect* of such pardon by the king is to make the offender a new man: to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him new credit and capacity (*u*).] And it seems to be settled that the pardon of treason or felony, even after conviction or attainder, will enable a man to have an action of slander against any one who shall call him either traitor or felon (*x*). A pardon also, if prior to conviction, will prevent any forfeiture either of lands or goods; though, on the other hand, it will not, without ex-

condition being transportation beyond seas.

(*q*) *Fost.* 43.

(*r*) *Hawk. P. C. b. 2, c. 37, s. 59.*

(*s*) *Hawk. P. C. b. 2, c. 37, s. 67.*

(*t*) *R. v. Parsons, 1 Show. 283.*

(*u*) *Hawk. P. C. b. 2, c. 37, s. 48.*

(*x*) *Ibid.*

[press words of restitution, divest either the Crown or a subject of any interest already vested in either, by force of an attainder or conviction precedent (*y*). And [nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and transcendent power of parliament. Yet if a person attainted receives the king's pardon, and afterwards hath a son, that son may be heir to his father, because the father being made a new man, might transmit new inheritable blood ;] though supposing him to be born before the pardon, he could never inherit it at all, but the land would escheat, if there were no child born since the pardon, *pro defectu hæredis* (*z*).

(*y*) Hawk. P.C. b. 2, c. 37, s. 54; (*z*) 1 Hale, P.C. 358. Vide *sup.*
 Bac. Abr. tit. Pardon, 11. ; see vol. 1. p. 449.
 Gough v. Davies, 25 L. J., Ch. 677.

CHAPTER XXVI.

OF EXECUTION.

[THERE now remains nothing to speak of but *execution*—the completion of human punishment(*a*). And this, in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy; whose warrant for so doing was antiently by precept under the hand and seal of the judge, as it is still practised in the court of the lord high steward upon the execution of a peer(*b*): though, in the court of the peers in parliament, it is done by writ from the king. Afterwards it was established, that in case of life, the judge may command execution to be done without any writ(*c*). And now the usage is, for the judge,] in the case of all trials at the assizes, [to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff] as his warrant or authority; and if the sheriff receives afterwards no special order to the contrary, he executes the judgment of the law accordingly(*d*).

(*a*) Vide sup. pp. 424, 552, n. (*a*).

(*b*) 2 Hale, P. C. 409.

(*c*) Finch, L. 478.

(*d*) See R. v. Bethel, 5 Mod. 22; Christian's Blackstone, vol. iv. p. 404, in *notis*, where it is said that "at the end of the assizes the clerk of the assize makes out in writing four lists of all the prisoners, with separate columns, containing their crimes, verdicts and sentences, leaving a blank column, which the judge fills up opposite the names

" of the capital convicts by writing, " to be reprieved, respited, transported, " &c. These four calendars, being " first carefully compared together " by the judge and the clerk of assize, are signed by them, and one " is given to the sheriff, one to the gaoler, and the judge and the clerk " of assize each keep another. If " the sheriff receives afterwards no " special order from the judge, he " executes the judgment of the law " in the usual manner, agreeably to

[The sheriff, upon receipt of his warrant, is to do execution within a convenient time; which is left at large (*e*). But in the court of queen's bench, if the prisoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for the execution; either specifying the time and place (*f*), or leaving it to the discretion of the sheriff (*g*).] And though in general the law has established no rule as to the time of execution, [it has been well observed, that it is of great importance that the punishment should follow the crime as early as possible; and that the prospect of gratification or advantage which tempts a man to commit the crime, should instantly awake the attendant idea of punishment (*h*). Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.

The sheriff cannot alter the manner of the execution, by substituting one death for another, without being guilty of felony himself, as has been formerly said (*i*). It is held

“the directions of his calendar. In every county this important subject is settled with great deliberation by the judge and the clerk of assize before the judge leaves the assize town; but probably in different counties, with some slight variations.”

(*e*) The time and place of the execution are by law no part of the judgment (see 4 Bl. Com. 404, where this is said to have been held by the twelve judges, Mich. 10 Geo. 3.) Formerly, indeed, the law required that a person convicted of *murder* should be executed on the day next but one after the sentence, unless that day fell on a Sunday, and in that case on the Monday following. (25 Geo. 2, c. 37; 9 Geo. 4, c. 31, s. 4.) But this was repealed by 6 & 7 Will.

4, c. 30.

(*f*) St. Trials, vi. 332; Fost. 43, See *Atkinson v. Reg.* (in error), 3 Bro. P. C. 517.

(*g*) In London the course as to execution on convicts formerly was, that the recorder reported to the king, in person, their several cases; and if he received the royal pleasure that the law must take its course, issued his warrant to the sheriffs, directing them to do execution at a specified time and place (4 Bl. Com. 404). But now by 7 Will. 4 & 1 Vict. c. 77, the practice of the Central Criminal Court, as to the award of execution in capital cases, is assimilated to that of other courts.

(*h*) Beccar. c. 19.

(*i*) Vide sup. p. 133.

[also by Sir Edward Coke (*j*) and Sir Matthew Hale (*k*), that even the king cannot change the punishment of the law, by altering the hanging or burning into beheading; though, when beheading is part of the sentence, the king may remit the rest. And, notwithstanding some examples to the contrary, Sir Edward Coke stoutly maintains, that "*judicandum est legibus, non exemplis*." But others have thought,—and more justly—that this prerogative, being founded in mercy, and immemorially exercised by the Crown, is part of the common law (*l*). For hitherto, in every instance, all these exchanges have been for more merciful kinds of death; and how far this may also fall within the king's power of granting conditional pardons (viz. by remitting a severe kind of death, on condition that the criminal submits to a milder), is a matter that may bear consideration. It is observable, that when Lord Stafford was executed for the popish plot in the reign of King Charles the second, the then sheriffs of London, having received the king's writ for beheading him, petitioned the house of lords for a command or order from their lordships how the said judgment should be executed; for, he being prosecuted by impeachment, they entertained a notion, (which is said to have been countenanced by Lord Russel,) that the king could not pardon any part of the sentence (*m*). The lords resolved, that the scruples of the sheriffs were unnecessary, and declared that the king's writ ought to be obeyed (*n*). Disappointed of raising a flame in that assembly, they immediately signified to the house of commons, by one of the members, that they were not satisfied as to the power of the said writ (*o*). That house took two days to consider of it: and then sullenly resolved, that the house was *content* that the

(*j*) 3 Inst. 52.

(*k*) 2 Hale, P. C. 412.

(*l*) Fost. 270; F. N. B. 144, h;

19 Rym, Fœd. 284.

(*m*) 2 Hume, 328.

(*n*) Lords' Journ. 21 Dec. 1680.

(*o*) Com. Journ. 21 Dec. 1680.

[sheriff do execute Lord Stafford, by severing his head from his body (*p*). It is further related, that when afterwards the same Lord Russel was condemned for high treason upon indictment, the king, while he remitted the ignominious part of the sentence, observed, “that his lordship would now find he was possessed of that prerogative which, in the case of Lord Stafford, he had denied him(*q*).” One can hardly determine (at this distance from those turbulent times) which most to disapprove of; the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

To conclude: it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again (*r*). For the former hanging was no execution of the sentence; and if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force, such a criminal, so reviving, was not allowed to take sanctuary and abjure the realm (*s*); but his fleeing to sanctuary was held an escape in the officer (*t*).

And, having thus arrived at the *last* stage of criminal proceedings, or execution,] which terminates our inquiry into the law of crimes, the subject of our sixth Book, we have also reached the end, properly speaking, of these Commentaries; yet it may be useful to endeavour to recal to the memory of the student some principal outlines of the legal constitution of this country, by a short historical review of the most considerable revolutions that have happened in the laws of England from the earliest to the present times: and this task shall be now attempted by way of conclusion.

(*p*) Com. Journ. 23 Dec. 1680.

(*q*) 2 Hume, 360.

(*r*) 2 Hale, P. C. 412; • Hawk. P. C. b. 2, c. 51, s. 7.

(*s*) Vide sup. p. 482, n. (*c*).

(*t*) Fitzh. Abr. tit. “Corone,” 335; Finch, L. 467. As to an escape, vide sup. p. 307.

CONCLUSION.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENT, OF THE LAWS OF ENGLAND.



[BEFORE we enter on our present subject, in which it is proposed, by way of supplement to the whole work, to attempt an historical review of the most remarkable changes and alterations that have happened in the laws of England,—it must be observed, that the rise and progress of many principal points and doctrines have been already pointed out in the course of these Commentaries, under their respective divisions; these having, therefore, been particularly discussed already, it cannot be expected that they should be re-examined with any degree of minuteness; which would be a most tedious undertaking. What, therefore, is at present proposed, is only to mark out some outlines of our English juridical history, by taking a chronological view of the state of our laws, and their successive mutations at different periods of time.

The several periods under which we shall consider the state of our legal polity,] are the following seven: [1. From the earliest times to the Norman conquest: 2. From the Norman conquest to the reign of king Edward the first: 3. From thence to the reformation: 4. From the reformation to the restoration of king Charles the second: 5. From thence to the revolution in 1688:] 6. From the revolution to the publication of Blackstone's Commentaries, on the Laws of England: 7. From the era last mentioned to the present time.

I. [And, first, with regard to the antient Britons, the *aborigines* of our island, we have so little handed down to us concerning them with any tolerable certainty, that our inquiries here must needs be very fruitless and defective. However, from Cæsar's account of the tenets and discipline of the antient Druids in Gaul, in whom centred all the learning of these western parts, and who were, as he tells us, sent over to Britain, (that is, to the island of Mona or Anglesey,) to be instructed,—we may collect a few points, which bear a great affinity and resemblance to some of the modern doctrines of our English law. Particularly the very notion itself of an oral unwritten law, delivered down from age to age by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing: possibly for want of letters: since it is remarkable that in all the antiquities, unquestionably British, which the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality also of lands, by the custom of gavelkind, which still obtains in many parts of England, and did universally over Wales till the reign of Henry the eighth, is undoubtedly of British original. So likewise is the antient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions. And we may also remember an instance of a slighter nature mentioned in the present volume, where the same custom continued law, from Cæsar's time,] down to the reign of George the fourth, *viz.* [that of burning a woman guilty of the crime of petit treason by killing her husband (*a*).

The great variety of nations, that successively broke in upon and destroyed both the British inhabitants and constitution,—the Romans, the Picts, and, after them, the various clans of Saxons and Danes,—must necessarily have caused great confusion and uncertainty in the laws

(a) Vide sup. p. 161.

[and antiquities of the kingdom ; as they were very soon incorporated and blended together, and therefore, we may suppose, mutually communicated to each other their respective usages, in regard to the rights of property, and the punishment of crimes (*a*). So that it is morally impossible to trace out with any degree of accuracy, *when* the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them, to their first and component principles (*b*). We can seldom pronounce, that *this* custom was derived from the Britons; *that* was left behind by the Romans; *this* was a necessary precaution against the Picts; *that* was introduced by the Saxons; discontinued by the Danes, but afterwards restored by the Normans.

Wherever this can be done, it is a matter of great curiosity, and some use : but this can very rarely be the case; not only from the reason above mentioned, but also from many others. First, from the nature of traditional laws in general ; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice (*c*) ; so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river, which varies its shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and its government : which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the original of its laws ; unless we had as authentic monuments thereof, as the Jews had by the hand of Moses (*d*). Thirdly, this uncertainty of the true origin

(*a*) Hale, Hist. C. L. 62.

(*b*) "It is an impossible piece of chemistry," says Hale, "to reduce every *caput legis* to its true origi-

nal, &c."—Hist. C. L. 64.

(*c*) Hale, Hist. C. L. 57.

(*d*) Ibid. 59.

[of particular customs must also in part have arisen from the means, whereby Christianity was propagated among our Saxon ancestors in this island—by learned foreigners brought over from Rome and other countries, who undoubtedly carried with them many of their own national customs; and probably prevailed upon the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cause, that we find not only some rules of the Mosaical, but also of the imperial and pontifical laws, blended and adopted into our own system.

A further reason may also be given for the great variety, and of course the uncertain original, of our antient established customs; even after the Saxon government was firmly established in this island: viz. the subdivision of the kingdom into many independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create an infinite diversity of laws: even though all those colonies, of Jutes, Angles, Anglo-Saxons, and the like, originally sprung from the same mother-country, the great northern hive; which poured forth its warlike progeny, and swarmed all over Europe, in the sixth and seventh centuries. This multiplicity of laws will necessarily be the case in some degree, where any kingdom is cantoned out into provincial establishments: and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen where so many unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the same or similar foundations.

When therefore the West Saxons had swallowed up all the rest, and King Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him,] we are told [to undertake a most great and necessary work, which he is said to have executed in as masterly a manner; no less than to new model the constitution; to rebuild it on a plan that,

[should endure for ages, and out of its old discordant materials, which were heaped upon each other in a vast and rude irregularity, to form one uniform and well-connected whole. This he effected by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours; for to him we owe that masterpiece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties, all under the influence and administration of one supreme magistrate the king: in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating ducts and channels; which wise institution has been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected,] it is said, [the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his *dom-~~be~~c*, or *liber judicialis*. This he compiled for the use of the court-baron, hundred and county court, the court-leet and sheriff's tourn: tribunals which he established for the trial of all causes civil and criminal, in the very districts wherein the complaint arose; all of them subject however to be inspected, controlled and kept within the bounds of the universal or common law by the king's own courts, which were then itinerant, being kept in the king's palace, and removing with his household in those royal progresses, which he continually made from one end of the kingdom to the other (e).

The Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric, but a plan so excellently concerted could never be long thrown aside. So that upon the expulsion of these

(e) As to the claim of Alfred to the institutions mentioned in the text, see Turner's Hist. of the Anglo-

Saxons, vol. ii. p. 149, 6th ed.; Hallam's Middle Ages, vol. ii. pp. 390, 402, 7th ed.

[intruders, the English returned to their antient law, retaining however some few of the customs of their late visitants, which went under the name of *Dane Lage*, as the code compiled by Alfred was called the *West-Saxon Lage*; and the local constitutions of the antient kingdom of Mercia, which obtained in the counties nearest to Wales and probably abounded with many British customs, were called the *Mercen Lage*. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm: the provincial polity of counties and their subdivisions having never been altered or discontinued through all the shocks and mutations of government, from the time of its first institution; though the laws and customs therein used have, as we shall see, often suffered considerable changes.

For King Edgar, (who besides his military merit as founder of the English navy, was also a most excellent civil governor,) observing the ill effects of three distinct bodies of laws, prevailing at once in separate parts of his dominions, projected and begun what his grandson King Edward the Confessor afterwards completed: viz. one uniform digest or body of laws to be observed throughout the whole kingdom, being probably no more than a revival of King Alfred's code, with some improvements suggested by necessity and experience; particularly the incorporating some of the British or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon Lage*, which was still the groundwork of the whole. And this appears to be the best supported and most plausible conjecture, (for certainty is not to be expected,) of the rise and original of that admirable system of maxims and unwritten customs, which is now known by the name of the common law, as extending its authority universally over all the realm, and which is doubtless of Saxon parentage.

Among the most remarkable of the Saxon laws we may reckon, 1. The constitution of parliament, or rather general assemblies of the principal and wisest men in the nation;

[the *wittenagemote* or *commune consilium* of the antient Germans, which was not yet reduced to the forms and distinctions of our modern parliament, without whose concurrence, however, no new law could be made or old one altered. 2. The election of their magistrates by the people; originally even that of their kings, till dear-bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that of all subordinate magistrates,—their military officers or heretochs, their sheriffs, their conservators of the peace, their coroners, their portreeves (since changed into mayors and bailiffs), and even their tithingmen and borsholders at the leet,—continued, some till the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued; only that perhaps in case of minority, the next of kin of full age would ascend the throne as king, and not as protector; though after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence, even the most notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage: to which, in subsequent times, the benefit of clergy in some measure succeeded. 5. The prevalence of certain customs—as heriots and military services in proportion to every man’s land, which much resembled the feudal constitution, but yet were exempt from all its rigorous hardships; and which may be well enough accounted for by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feudal law, before it got into the hands of the Norman jurists; who extracted the most slavish doctrines and oppressive consequences out of what was originally intended as a law of liberty. 6. The liability of their estates to forfeiture for treason, while the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them.

[7. The descent of their lands to all the males equally, without any right of primogeniture: a custom which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conquest; though really inconvenient, and more especially destructive to antient families, which are in monarchies necessary to be supported, in order to form and keep up a nobility, or intermediate state between the prince and the common people. 8. The courts of justice—consisting principally of the county courts, and in cases of weight or nicety the king's court held before himself in person, at the time of his parliaments; which were usually holden in different places, according as he kept the three great festivals of Christmas, Easter, and Whitsuntide. An institution which was adopted by King Alonso the seventh of Castile, about a century after the Conquest, who, at the same three great feasts, was wont to assemble his nobility and prelates in his court; who there heard and decided all controversies, and then, having received his instructions, departed home(e). These county courts, however, differed from the courts so called in modern times(f), in that the ecclesiastical and civil jurisdiction were blended together, the bishop and the ealdorman or sheriff sitting in the same county court, and also that the decisions and proceedings therein were much more simple and unembarrassed; an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. The modes of trial—which, among a people who had a very strong tincture of superstition, were permitted to be by *ordeal*, by the *corsned*, or morsel of execration, or by *wager of law* with compurgators.] And to these we are to add the occasional resort to modes of determining controversies, resembling, in some respects, the celebrated institution which we now enjoy under the

(e) Mod. Un. Hist. xx. 114.

(f) Blackstone is here speaking, it will be noticed, of the sheriff's county court,—not of the district or

new county court, which is an institution of our own day. (Vide sup. vol. III. p. 393 et seq.)

name of trial by jury, and to which we are accustomed to refer as the principal bulwark of our national liberties (*g*). [Thus stood the general frame of our polity at the time of the Norman invasion, when the second period of our legal history commences.

II. This remarkable event wrought as great an alteration in our laws, as it did in our antient line of kings; and though the alteration of the former was effected rather by the consent of the people, than any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.

1. Among the first of these alterations, we may reckon the separation of the ecclesiastical courts from the civil: effected in order to ingratiate the new king with the popish clergy, who for some time before had been endeavouring all over Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people, and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interests; and this was the more easily effected, because the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

2. Another violent alteration of the English constitution consisted in the depopulation of whole counties for the purposes of the king's royal diversion, and subjecting both them, and all the antient forests of the kingdom, to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man.] And though

(*g*) Turner's Hist. Ang. Sax. vol. iii. p. 223, 6th edit.; Hallam's Mid. Ag. vol. ii. p. 396, 7th ed.

these laws were mitigated in the time of Henry the third and in succeeding reigns,—yet [from this root afterwards sprung a bastard slip, known by the name of the game law,] by which none were permitted, in general, to take or sell game, even on his own estate, unless qualified by the ownership of land to the yearly value of at least 100*l.*; an arbitrary restraint under which the subjects of this realm continued to labour, until its tardy abolition in the reign of William the fourth.

3. [A third alteration in the English laws was by narrowing the remedial influence of the county courts, the great seats of Saxon justice, and extending the *original* jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the *aula regis*, with all its multifarious authority, was erected, and a capital justiciary appointed, with powers so large and boundless, that he became at length a tyrant to the people, and formidable to the Crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy; and the consequence naturally was, the ordaining that all proceedings in the king's court should be carried on in the Norman instead of the English language: a provision the more necessary, because none of his Norman justiciars understood English; but as evident a badge of slavery as ever was imposed upon a conquered people. This lasted till King Edward the third obtained a double victory, over the armies of France in their own country, and the language in our courts here at home: but there was one mischief too deeply rooted thereby, and which this caution of King Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the county courts, the chicanes and subtleties of Norman jurisprudence had taken possession of the king's courts, to which every cause of consequence was drawn. Indeed that age, and those immediately succeeding it, were the æra of refinement and subtlety. There is an active prin-

[ciple in the human soul, that will ever be exerting its faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and country, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those who had leisure to cultivate its progress were such only as were cloistered in monasteries, the rest being all soldiers or peasants; and, unfortunately, the first rudiments of science which they imbibed were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators; which were brought from the East by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a rising state, were those of the noblest kind,—the establishment of religion, and the regulations of civil polity,—yet, having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphysical subtleties, with a skill most amazingly artificial; but which serves no other purpose than to show the vast powers of the human intellect, however vainly or preposterously employed. Hence law in particular, which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy, especially when blended with the new refinements engrafted upon feudal property; which refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede (as they did in great measure) the more homely but more intelligible maxims of distributive justice among the Saxons. And, to say the truth, these scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven in the body of our legal polity, that they cannot now be taken out without a mani-

[fest injury to the substance,] unless the greatest care be used in the operation. [Statute after statute has in later times been made to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigour; and the endeavour has greatly succeeded; but still the scars are deep and visible; and the liberality of our modern courts of justice has been] much called into action, in aid of the express enactments, [in order to recover that equitable and substantial justice which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence.

4. A fourth innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations, but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century; and from them it passed to other nations, particularly the Franks and the Normans; which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. But the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the fiction of feudal tenure, which drew after it a numerous and oppressive train of servile fruits and appendages; aids, reliefs, primer seisins, wardships, marriages, escheats and fines for alienation; the genuine consequences of the maxim then adopted, that all the lands in England were derived from and holden mediately or immediately of the Crown.

The nation at this period seems to have groaned under as absolute a slavery, as was in the power of a warlike, an ambitious and a politic prince to create. The consciences of men were enslaved by sordid ecclesiastics, devoted to a

[foreign power, and unconnected with the civil state under which they lived; who now imported from Rome for the first time the whole *farrago* of superstitious novelties, which had been engendered by the blindness and corruption of the times, between the first mission of Augustin the monk and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images; not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws, too, as well as the prayers, were administered in an unknown tongue. The antient trial by jury gave way to the impious decision by battel. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy *curfew*. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites, who, by a gradual progression of slavery, were absolute vassals to the Crown, and as absolute tyrants to the commons. Unheard-of forfeitures, talliages, aids and fines were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And, to crown all, as a consequence of the tenure by knight service, the king had always ready at his command an army of sixty thousand knights or *milites*: who were bound, upon pain of confiscating their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade, or foreign merchandize, such as it then was, was carried on by the Jews and Lombards; and the very name of an English fleet, which King Edgar had rendered so formidable, was utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons or great lords of the land; the knights or soldiery, who were the subordinate landholders; and the burghers or inferior tradesmen, who, from their insigni-

[ficancy, happily retained, in their socage and burgage tenure, some points of their antient freedom. All the rest were villeins or bondmen.

From so complete and well-concerted a scheme of servility, it has been the work of generations for our ancestors to redeem themselves and their posterity into that state of liberty which we now enjoy: which, therefore, is not to be looked upon as consisting of mere encroachments on the Crown, and infringements on the prerogative, as some slavish and narrow-minded writers have endeavoured to maintain: but as, in general, a gradual restoration of that antient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman. How that restoration has in a long series of years been step by step effected, we now proceed to inquire.

William Rufus proceeded on his father's plan; and in some points extended it, particularly with regard to the forest laws. But his brother and successor, Henry the first, found it expedient, when first he came to the crown, to ingratiate himself with the people, by restoring (as our monkish historians tell us) the laws of King Edward the Confessor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feudal tenures, but reserved the tenures themselves, for the same military purposes that his father introduced them. He also abolished the *curfew* (*h*); for, though it is mentioned in our laws a full century afterwards (*i*), yet it is rather spoken of as a known *time* of night (so denominated from that abrogated usage) than as a still subsisting custom. There is extant a code of laws in his name, consisting partly of those of the Confessor, but with great additions and alterations of his own, and chiefly calculated for the regulation of the county courts. It contains some directions as to

(*h*) Spelm. Cod. LL. W. 1, 288,
Hen. 1, 299.

(*i*) Stat. Civ. Lond. 13 Edw. 1.

[crimes and their punishments (that of theft being made capital in his reign), and a few things relating to estates, particularly as to the descent of lands; which, being by the Saxon laws equally to all the sons,—by the feudal or Norman to the eldest only,—King Henry here moderated the difference; directing the eldest son to have only the principal estate, “*primum patris feudum*,” the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots; reserving, however, these ensigns of patronage,—*congé d’eslire*, custody of the temporalities when vacant, and homage upon their restitution. He, lastly, united again for a time the civil and ecclesiastical courts; which union was soon dissolved by his Norman clergy: and, upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father’s time: from whence we may easily perceive how far short this was of a thorough restitution of King Edward’s or the Saxon laws.

The usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is from his reign, however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

By the time of King Henry the second, if not earlier, the charter of Henry the first seems to have been forgotten; for we find the claim of marriage, ward, and relief, then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived; being found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However, in this prince’s reign, much was done to methodize the laws, and reduce them into a regular order, as appears from that ex-

[cellent treatise of Glanvil: which, though some of it be now antiquated and altered, yet, when compared with the code of Henry the first, it carries a manifest superiority (*h*). Throughout his reign, also, was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome; the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the first: when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the reign of Henry the second, now under consideration, there are four things which peculiarly merit the attention of a legal antiquary: 1. The constitution of the parliament at Clarendon, A.D. 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from their secular jurisdiction; though his further progress was unhappily stopped, by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices of eyre, *in itinere*; the king having divided the kingdom into six circuits]—a division but little different from the present; and having [commissioned these new created judges to administer justice, and try writs of assize, in the several counties. These remedies are said to have been then first invented: before which, all causes were usually terminated in the county courts, according to the Saxon custom; or before the king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for little debts and minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters

[of considerable moment. 3. The introduction and establishment of the grand assize, or trial by special kind of jury, in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battel. 4. To this time must also be referred the introduction of escuage, or pecuniary commutation for personal military service; which in process of time was the parent of the antient subsidies granted to the Crown by parliament, and the land-tax of later times.

Richard the first, a brave and magnanimous prince, was a sportsman as well as a soldier; and therefore enforced the forest laws with some rigour, which occasioned many discontents among his people; though (according to Matthew Paris) he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting; probably finding that their severity prevented prosecutions. He also, when abroad, composed a body of naval laws at the isle of Oleron, which are still extant, and of high authority; for in his time we began again to discover that (as an island) we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the justices in eyre; the king's thoughts being chiefly taken up by the knight errantry of a croisade against the Saracens in the holy land.

In King John's time, and that of his son, Henry the third, the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories; which, at last, had this effect, that, first, King John, and afterwards his son, consented to the two famous charters of English liberties, *Magna Charta* and *Charta de Foresta*. Of these the latter was well calculated to redress many grievances and encroachments of the Crown in the exertion of forest law; and the former confirmed many liberties of the church, and redressed many grievances incident to feudal

[tenures, of no small moment at the time: though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses or other process for debts or services due to the Crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the law relative to the forfeiture of lands for felony, and prohibited for the future the grants of exclusive fisheries, and the erection of new bridges, so as to oppress the neighbourhood. With respect to private rights, it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it regulated the law of dower; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern, it enjoined an uniformity of weights and measures; gave new encouragements to commerce, by the protection of merchant strangers; and forbade the alienation of lands in mortmain. With regard to the administration of justice, besides prohibiting all denials or delays of it, it fixed the Court of Common Pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses; and, at the same time, brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits: it also corrected some abuses then incident to the trials by wager of law and of battel; directed the regular awarding of inquests for life or member; prohibited the king's inferior ministers from holding pleas of the Crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county-court, sheriff's tourn, and court-leet.

[It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, lastly, (which alone would have merited the title that it bears, of the *great* charter,) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land (*l*).

However, by means of these struggles the pope, in the reign of King John, gained a still greater ascendant here than he ever had before enjoyed, which continued through the long reign of his son, Henry the third, in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may, by this time, perceive in Bracton's treatise a still further improvement in the method and regularity of the common law, especially in the point of pleadings (*m*). Nor must it be forgotten, that the first traces which remain of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of King John, though omitted in that of Henry the third; and that towards the end of the latter of these reigns we find the first record of any writ for summoning knights, citizens, and burgesses to parliament. And here we conclude the second period of our English legal history.

III. The third period commences with the reign of Edward the first, who hath justly been styled our English Justinian. For in his time the law did receive so sudden a perfection, that Sir Matthew Hale does not scruple to

(*l*) The following is the celebrated 29th chapter of *Magna Charta*, the foundation of the liberty of Englishmen: "*Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur de libero tenemento suo, vel libertatibus vel libertis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo*

destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus rectum vel iustitiam." ⁴

(*m*) Hale, Hist. C. L. 156.

[affirm (n), that more was done in the first thirteen years of his reign, to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together.

It would be endless to enumerate all the particulars of these regulations; but the principal may be reduced under the following general heads. 1. He established, confirmed and settled the great charter and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction; and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction,—those of the king's bench, common pleas, and exchequer,—so as they might not interfere with each other's proper business; to do which they were afterwards obliged to have recourse to fictions. 4. He settled the boundaries of the inferior courts in counties, hundreds, and manors, confining them to causes of no great amount, according to their primitive institution; though of considerably greater than, by the alteration of the value of money, they were afterwards permitted to determine. 5. He secured the property of the subject, by abolishing all arbitrary taxes and talliages levied without consent of the national council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. 7. He settled the form, solemnities, and effect of fines levied in the Court of Common Pleas, though the thing itself was of Saxon original. 8. He first established a repository for the public records of the kingdom, few of which are more antient than the reign of his father, and those were by him collected. 9. He improved upon the laws of King Alfred, by that great and orderly method of watch and ward for preserving the public peace and

[preventing robberies, established by the statute of Winchester. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of *quia emptores*. 11. He instituted a speedier way for the recovery of debts, by granting execution not only upon goods and chattels, but also upon lands, by writ of *elegit*; which was of signal benefit to a trading people; and, upon the same commercial ideas, he also allowed the charging of lands in a statute merchant, to pay debts contracted in trade,—contrary to all feudal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law was extremely deficient. 13. He also effectually closed the great gulph in which all the landed property of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses. 14. He established a new limitation of property by the creation of estates tail: concerning the good policy of which, however,] in the strict shape at least that originally belonged to them, [modern times have entertained a very different opinion. 15. He reduced all Wales to the subjection not only of the Crown, but, in great measure, of the laws of England]—an improvement which has been since thoroughly completed; [and he seems to have entertained a design of doing the like by Scotland, so as to have formed an entire and complete union of the island of Great Britain.

This catalogue might be continued much further: but, upon the whole, we may observe, that the very scheme and model of the administration of common justice between party and party was entirely settled by this *king* (*p*); and has continued nearly the same, in all succeeding ages, to this day: abating some few alterations, which the humour or necessity of subsequent times hath occasioned. The

[forms of writs, by which actions are commenced, were perfected in his reign, and established as models for posterity. The pleadings, consequent upon the writs, were then short, nervous, and perspicuous; not intricate, verbose, and formal. The legal treatises, written in his time, as Britton, Fleta, Hengham (*q*), and the rest, are, for the most part, law at this day; or at least *were* so, till the alteration of tenures took place. And, to conclude, it is from this period, from the exact *observation* of *Magna Charta*, rather than from its *making* or *renewal*, in the days of his grandfather and father, that the liberty of Englishmen began again to rear its head; though the weight of the military tenures hung heavy upon it for many ages after.

A better proof cannot be given of the excellence of his constitutions, than that from his time to that of Henry the eighth there happened very few, and those not very considerable, alterations in the legal *forms* of proceedings. As to matter of *substance*: the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people in the reigns of Edward the second and Edward the third; and justices of the peace were established instead of the latter. In the reign also of Edward the third the parliament is supposed most probably to have assumed its present form; by a separation of the Commons from the Lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly; and the translation of the law proceedings, from French into Latin, another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in

(*q*) As to these, see Reeves's Hist. Eng. L. vol. ii. p. 280, &c.

[general; for, in particular, it enlarged the credit of the merchant, by introducing the statute staple; whereby he might the more readily pledge his lands for the security of his mercantile debts. And, as personal property now grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law; to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious.. The statutes also of *præmunire*, for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century: though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution, introduced into the laws of the land by the influence of the regular clergy.

From this time to that of Henry the seventh, the civil wars and disputed titles to the crown gave no leisure for further juridical improvement: "*nam silent leges inter arma.*" And yet it is to these very disputes that we owe the happy loss of all the dominions of the Crown on the continent of France; which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise we owe the method of barring entails by the fiction of *common recoveries*, invented originally by the clergy, to evade the statutes of mortmain, but introduced under Edward the fourth, for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of *uses*, another of the clerical inventions.

In the reign of King Henry the seventh, his ministers,

[not to say the king himself, were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing character of this reign was, that of amassing treasure in the king's coffers, by every means that could be devised: and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this, and this only, for their great and immediate object. To this end the Court of Star Chamber was new modelled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments at the assizes and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to alien. The benefit of clergy, which so often intervened to stop attainders and save the inheritance, was now allowed only once to lay offenders, who only could have inheritances to lose. A writ of *capias* was permitted in all actions on the case, and the defendant might in consequence be outlawed; because upon such outlawry his goods became the property of the Crown. In short, there is hardly a statute in this reign, introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the fourth period of our legal history, viz. the reformation of religion, under Henry the eighth, and his children; which opens an entirely new scene in ecclesiastical matters; the usurped power of the pope being now for ever routed and destroyed, all his connexions with this island cut off, the Crown restored to its supremacy over spiritual men and causes, and the patronage of bishoprics being once more indisputably vested in

[the king. And, had the spiritual courts been at this time reunited to the civil, we should have seen the old Saxon constitution, with regard to ecclesiastical polity, completely restored.

With regard also to our *civil* polity, the statute of wills and the statute of uses, both passed in the reign of this prince, made a great alteration as to property: the former by allowing the *devise* of real estates by will, which before was in general forbidden; the latter, by endeavouring to destroy the intricate nicety of *uses*, though the narrowness and pedantry of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction, dictated by common justice and common sense; which, however arbitrarily exercised or productive of jealousies in its infancy, has at length been matured into a system of rational jurisprudence; the principles of which, notwithstanding they may differ in forms, are now equally adopted by the courts of both law and equity. From the statute of uses, and another statute of the same antiquity, which protected estates for years from being destroyed by the reversioner, a remarkable alteration took place in the mode of conveyancing: the antient assurance by feoffment and livery upon the land being thenceforth very seldom practised, since the more easy and more private invention of transferring property by secret conveyances to uses,—and long terms of years being now continually created in mortgages and family settlements, which might be moulded to a thousand useful purposes by the ingenuity of an able artist.

The further attacks in this reign upon the immunity of estates tail, which reduced them to little more than the conditional fees at the common law before the passing of the statute *De donis*; the establishment of recognizances in the nature of a statute staple, for facilitating the raising of money upon landed security, and the introduction of the bankrupt laws, as well for the punishment of the fraudu-

[lent, as the relief of the unfortunate, trader ; all these were capital alterations of our legal polity, and highly convenient to that character, which the English began now to re-assume, of a great commercial people. The incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy ; and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry the eighth a very distinguished era in the annals of juridical history.

It must be however remarked, that particularly in his later years, the royal prerogative was strained to a very tyrannical and oppressive height ; and, what was the worst circumstance, its encroachments were established by law, under the sanction of those pusillanimous parliaments, one of which, to its eternal disgrace, passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament ; and others concurred in the creation of that amazing heap of wild and newfangled treasons, which were slightly touched upon in a former place. Happily for the nation this arbitrary reign was succeeded by the minority of an amiable prince, during the short sunshine of which great part of these extravagant laws were repealed. And to do justice to the shorter reign of Queen Mary, many salutary and popular laws, in civil matters, were made under her administration, perhaps the better to reconcile the people to the bloody measures which she was induced to pursue, for the re-establishment of religious slavery : the well-concerted schemes for effecting which were, through the providence of God, defeated by the seasonable accession of Queen Elizabeth.

The religious liberties of the nation being, by that happy event, established (we trust) on an eternal basis, though obliged in their infancy to be guided, against papists and

[other nonconformists, by laws of too sanguinary a nature: the forest laws having fallen into disuse; and the administration of civil rights in the courts of justice being carried on in a regular course, according to the institutions of King Edward the first, without any material innovations; all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements; except only in the continuation of the military tenures, and a few other points, which still armed the Crown with a very oppressive and dangerous prerogative. It is also to be remarked, that the spirit of enriching the clergy and endowing religious houses had (through the former abuse of it) gone over to such a contrary extreme, and the princes of the house of Tudor and their favourites had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the *restraining* statutes, to prevent the alienations of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of Queen Elizabeth, more humane and beneficial than even the feeding and clothing of millions; by affording them the means, with proper industry, to feed and to clothe themselves. And, the further any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

However, considering the reign of Queen Elizabeth in a great and political view, we have no reason to regret many subsequent alterations in the English constitution. For, though in general she was a wise and excellent princess, and loved her people; though in her time trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home; yet the increase of the power of the Star Chamber,

and the erection of the High Commission Court in matters ecclesiastical, were the work of her reign. She also kept her parliaments at a very awful distance; and in many particulars she, at times, would carry the prerogative as high as her most arbitrary predecessors. It is true, she very seldom exerted this prerogative, so as to oppress individuals; but still she had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit; but at the same time it is sufficient to show, that these were not those golden days of genuine liberty that we formerly were taught to believe; for surely the true liberty of the subject consists not so much in the gracious behaviour, as in the limited power, of the sovereign.

The great revolutions that had happened, in manners and in property, had paved the way, by imperceptible yet sure degrees, for as great a revolution in government: yet, while that revolution was effecting, the Crown became more arbitrary than ever, by the progress of those very means which afterwards reduced its power.

It is obvious to every observer, that till the close of the Lancastrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth, before the extension of trade, was comparatively small; and the nature of their landed property was such as kept them in continual dependence upon their feudal lord, being usually some powerful baron, some opulent abbey, or sometimes the king himself. Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals were little regarded or thought of; nay, even to assert them was treated as the height of sedition and rebellion. Our ancestors heard, with detestation and horror, those sentiments rudely delivered, and pushed to

[most absurd extremes, by the violence of a Cade and a Tyler, which have since been applauded, with a zeal almost rising to idolâtry, when softened and recommended by the eloquence, the moderation, and the arguments, of a Sidney, a Locke and a Milton. But when learning, by the invention of printing and the progress of religious reformation, began to be universally disseminated; when trade and navigation were suddenly carried to an amazing extent, by the use of the compass and the consequent discovery of the Indies: the minds of men, thus enlightened by science and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative (the nobility and clergy), were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury (which knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves), and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expenses; to gratify which they were permitted, by the policy of the times, to dissipate their overgrown estates and alienate their antient patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the spoil of the monasteries and the great increase of the customs, grew rich, independent, and haughty: and the commons were not yet sensible of the strength they had acquired, nor urged to examine its extent by new burthens or oppressive taxations, during the sudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamed

[of opposing the prerogative, to which they had been so little accustomed; much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry the eighth were, therefore, the times of the greatest despotism that have been known in this island since the death of William the Norman: the prerogative, as it then stood by common law, and much more when extended by Act of Parliament, being too large to be endured in a land of liberty.

Queen Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as their father King Henry the eighth. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the Queen of Scots, occasioned greater caution in her conduct. She, probably, or her able advisers, had penetration enough to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore drew a veil over the odious part of the prerogative; which was never wantonly thrown aside, but only to answer some important purpose: and, though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely, for the space of half a century together, reign in the affections of the people.

On the accession of King James the first, no new degree of royal power was added to, or exercised by, him: but such a sceptre was too weighty to be wielded by such a hand. The unreasonable and imprudent exertion of

[what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported: and common reason assured them, that, if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leaders felt the pulse of the nation, and found they had ability, as well as inclination, to resist it; and accordingly resisted and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial; and they gained some little victories in the cases of concealments, monopolies, and the dispensing power. In the mean time, very little was done for the improvement of private justice except the abolition of sanctuaries, and the extension of the bankrupt laws, the limitation of suits and actions, and the regulating of informations upon penal statutes. For we cannot class the laws against witchcraft and conjuration, under the head of improvements; nor did the dispute between Lord Ellesmere and Sir Edward Coke, concerning the powers of the Court of Chancery, tend much to the advancement of justice.

Again, when Charles the first succeeded to the crown of his father, and attempted to revive some enormities which had been dormant in the reign of King James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of that misguided prince's reign; which, though the noon of it, began a little to brighten, at last went down in blood, and left the whole kingdom in

[darkness. It must be acknowledged that, by the Petition of Right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest laws, which the Crown most unseasonably revived. The legal jurisdiction of the Star Chamber and High Commission Courts, was also extremely great; though their usurped authority was still greater. And, if we add to these, the disuse of parliaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors, in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship-money, and other projects, we may see grounds most amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given; for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the Star Chamber and High Commission Courts, for ascertaining the extent of forests and forest laws, for renouncing ship-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in consequence of their feudal tenures: though it must be acknowledged that these concessions were not made with so good a grace as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity; which is the greatest unhappiness that can befall a prince. Though he formerly had strained his prerogative not only beyond what the genius of the present times would bear, but also beyond the examples of former ages, he had now consented to reduce it to a lower ebb than was consistent with monarchical government. A conduct so opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that this condescen-

[sion was merely temporary. Flushed, therefore, with the success they had gained, fired with resentment for past oppressions, and dreading the consequences if the king should regain his power, the popular leaders, who in all ages have called themselves the *people*, began to grow insolent and ungovernable; their insolence soon rendered them desperate; and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the Church and monarchy, and proceeded, with deliberate solemnity, to the trial and murder of their sovereign.

We pass by the crude and abortive schemes for amending the laws, in the times of confusion which followed: the most promising and sensible whereof, such as the establishment of new trials, the abolition of feudal tenures, the Act of navigation, and some others, were adopted in the—

V. Fifth period, which is to be next mentioned, viz. after the restoration of King Charles the second. Immediately upon which, the principal remaining grievance, the doctrine and consequences of military tenures, was taken away and abolished, except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch in whose person the royal government was restored, and with it our antient constitution, deserves no commendation from posterity, yet in his reign, wicked, sanguinary, and turbulent, as it was, the concurrence of happy circumstances was such, that from thence we may date not only the re-establishment of our Church and monarchy, but also the complete restitution of English liberty, for the first time since its total abolition at the Conquest. For therein not only these slavish tenures, the badge of foreign dominion, with all their oppressive appendages, were removed from encumbering the estates of the subject; but also an addi-

[tional security of his person from imprisonment was obtained, by that great bulwark of our constitution, the *Habeas Corpus* Act. These two statutes, with regard to our property and persons, form a second *Magna Charta*, as beneficial and effectual as that of Running-Mead. That only pruned the luxuriances of the feudal system; but the statute of Charles the second extirpated all its slaveries,—except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the interposition of our courts of justice,] and under recent enactments seem to be approaching a final extinction. [*Magna Charta* only, in general terms, declared, that no man shall be imprisoned contrary to law: the *Habeas Corpus* Act points him out effectual means, as well to release himself, (though committed even by the king in council,) as to punish all those who shall thus unconstitutionally misuse him.

To this may be added the abolition of the prerogatives of purveyance and pre-emption; the statute for holding triennial parliaments; the Test and Corporation Acts, passed to secure both our civil and religious liberties,] though the sacramental test required by them was afterwards abolished, as no longer suited to the state of the times in which we live(*q*); [the abolition of the writ *de hæretico comburendo*; the statute of frauds and perjuries, a great and necessary security to private property; the statute for distribution of intestates' estates; and that of amendments and *jeofails*, which cut off] many of [those superfluous niceties which so long had disgraced our courts; together with many wholesome Acts that were passed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, will be sufficient to demonstrate this truth, “that the constitution of England had arrived

(*q*) By 9 Geo. 4, c. 17.

[" to its full vigour, and the true balance between liberty and prerogative was happily established by *law*, in the reign of Charles the second."

It is by no means intended to palliate or defend many very iniquitous proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. What seems incontestable is this, that *by the law (r)*, as it then stood, notwithstanding some invidious, nay dangerous, branches of the prerogative, have since been lopped off, and the rest more clearly defined, the people had] a larger portion of real liberty than they had enjoyed in this country since the Norman conquest (s); [and sufficient power residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative; for which we need but appeal to the memorable catastrophe of the next reign. For when King Charles's deluded brother attempted to enslave the nation. he found it was beyond his power: the people both could and did resist him; and, in consequence of such resistance, obliged him to quit his enterprise and his throne together:] which introduces us to the next period of our legal history, viz.—

VI. From the revolution in 1688, to the time of the publication of Blackstone's Commentaries. In this period many laws were passed; [as the Bill of Rights, the Toleration Act, the Act of Settlement with its conditions, the Act for uniting England with Scotland, and some others,

(r) Blackstone here subjoins in a note, "The point of time at which I would choose to fix this *theoretical* perfection of our public law, is the year 1679, after the Habeas Corpus Act was passed, and that for licensing the press had expired; though the years which immediately followed it, were times

"of great *practical* oppression."

(s) Blackstone's expression in this place is,—"as large a portion of real liberty as is consistent with a state of society." But the truth of the proposition, carried to this extent, may be doubted; particularly if it be intended to include religious liberty.

[which asserted our liberties in more clear and emphatical terms; regulated the succession of the Crown by Parliament, as the exigencies of religious and civil freedom required; confirmed and exemplified the doctrine of resistance, when the executive magistrate endeavours to subvert the constitution; maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal;] indulged tender consciences in several points relating to religion (†); [established triennial, since turned into septennial, elections of members to serve in parliament; excluded certain officers from the house of commons; restrained the king's pardon from obstructing parliamentary impeachments; imparted to all the lords an equal right of trying their fellow peers; regulated trials for high treason; set bounds to the civil list; placed the administration of that revenue in hands that are accountable to parliament; and made the judges completely independent of the sovereign, his ministers, and his successors. Yet, though these provisions, in appearance and nominally, reduced the strength of the executive power to a much lower ebb than in the preceding period, if, on the other hand, we throw into the opposite scale, (what perhaps the immoderate reduction of the ancient prerogative may have rendered in some degree necessary,) the vast acquisition of force arising from the Riot Act, and the annual expedience of a standing army, and the vast acquisition of personal attachment arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest, we shall find that the Crown, gradually and imperceptibly, gained almost as much in influence, as it apparently lost in prerogative.

(†) Blackstone's expression is,—
 "indulged tender consciences with
 "every religious liberty consistent
 "with the safety of the State." At

the present day, however, it would
 perhaps be generally held, that the
 indulgence fell far short of this
 limit. • . .

[The chief alterations of moment,—for the time would fail were we to descend to *minutiæ*,—in the administration of private justice during this period, were the solemn recognition of the law of nations with respect to the rights of ambassadors; the cutting off, by the statute for the amendment of the law, a vast number of excrescences, that in process of time had sprung out of the practical part of it; the protection of corporate rights by the improvements in writs of *mandamus* and informations in nature of *quo warranto*; the regulation of trials by jury, and the admitting witnesses for prisoners, upon oath; the further restraints upon alienation of lands in mortmain; the annihilation of the terrible judgment of *peine forte et dure*; the extension of the benefit of clergy, by abolishing the pedantic criterion of reading; the counterbalance to this mercy, by the vast increase of capital punishment; the new and effectual methods for the speedy recovery of rents: the improvements which were made in ejectments for the trying of titles; the introduction and establishment of paper credit, by indorsements upon bills and notes, which have shown the legal possibility and convenience, which our ancestors so long doubted, of assigning a *chose in action*; the translation of all legal proceedings into the English language; the erection of courts of conscience for recovering small debts; the establishment of the great system of marine jurisprudence, of which the foundations were laid, by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases;] and, lastly, the enlargement of view which introduced into our courts of common law, in some instances where narrower doctrines once prevailed, the same principles of redress as were already established in our courts of equity.

VII. During the period of about a century which has elapsed since the publication of Blackstone's Commenta-

ries, the most conspicuous event in our legislative annals has been the Act for the union of Great Britain and Ireland, a measure recommended by the wisest and most unquestionable policy, to two nations so nearly connected by their geographical position and their common subjection to the same Crown, and so long already united in language, in civil institutions, and in arms. We may also single out for particular enumeration, the Act to amend the representation of the people, and that to regulate municipal corporations; two statutes of transcendent importance, as having been designed to extinguish, and having in fact materially abated, the indirect influence immemorially exercised by wealth and power, in our general and local institutions.

Of the other measures of importance, those relating to the Church may next attract our attention; and here we may notice the repeal of the sacramental test, by which dissenters in general were relieved from all restraints that had before excluded them from free participation with their fellow subjects in political rights; the Catholic Emancipation Act, by which the same benefit was bestowed on those who profess the faith of the Church of Rome; the many other Acts for relief of the same persons from all forfeitures and penalties to which they had before been liable in respect of their religious tenets: the Acts for commutation of tithes; for reform of the law relative to pluralities and residence; for the better application of cathedral revenues; and for the extension of the places of worship belonging to the established Church, and the general increase of her efficiency as regards the cure of souls.

On the merits of many of these measures, indeed, opinions have been much divided, as will always be the case upon questions connected with politics or religion; but a more unmixed applause may reasonably be claimed for the improvements that have been introduced in relation

to our social economy,—for the abolition of the slave-trade, and of slavery in the colonies, for the Acts relative to trade and navigation, to banking, to registration, to lunatic asylums, to gaols, to the manner of celebrating marriage, to education, to copyright and patent right, to charitable trusts and benevolent institutions, and to the general relief of the poor.

It is however in regard to the rights of property and the administration of justice, that the genius of reform has latterly displayed its chief activity, and that its achievements have been, upon the whole, the most triumphant. It would be impossible, without a tedious minuteness of detail, to recount the whole of these. But under the first head, our notice is particularly due to the improvements which have taken place in the law of descent or inheritance, of prescription, of dower, and of the limitation of the time for recovering real estate; to the better regulation of wills and testaments; to the deliverance of entails and the estates of married women from the thralldom of expensive and cumbrous forms of conveyance, and the substitution of better methods; to the introduction of greater simplicity and uniformity in several other particulars, and greater freedom of disposition, into that part of our legal system which relates to the alienation of land; and to the provisions for facilitating the relief of copyhold estates from the burthens of an oppressive tenure, and their conversion into freehold.

Under the reforms in the administration of civil justice may be particularized the better regulation of juries; the abolition of the separate judicature of Wales; the improved arrangement of the Terms, and of the proceedings in error; the abolition of the antiquated forms of real actions, which had survived the lapse of ages only to subserve the purposes of chicanery; the provision for speedy judgment and execution, upon verdicts; the new improvements in the proceedings by ejectment, prohibition, and mandamus;

the powers conferred on the courts of common law to grant injunctions against the repetition or continuance of private injuries, to give relief to parties exposed to adverse claims, and to order the examination of witnesses, and of the parties themselves, on interrogatories, and the issuing of commissions for examination of witnesses abroad; the many important and elaborate improvements in the forms of process and pleading, both as regards the courts of common law and of equity; the reformation of the law of evidence: and the establishment of the new courts of bankruptcy, of the vice-chancellors and of the lords justices in equity, of the judicial committee of the privy council, of the new county courts, of the court of probate, and of the court for divorce and matrimonial causes.

And, lastly, with respect to the administration of criminal justice, we may refer to the salutary repeal of many antiquated statutes; the consolidation of the law relating to most of the principal offences; the abolition of the benefit of clergy, and of appeals; the better regulation of the law of principal and accessory, of commitment and bail, and of venue; the introduction of a variety of provisions tending to simplify the course of proceeding, and to deliver it from technical difficulties; the allowance of counsel to address the jury for the prisoner, in felony, as well as in other cases; and the remarkable mitigation which has generally taken place in the antient severity of our criminal punishments.

Thus therefore, for the amusement and instruction of the reader, have been delineated [some rude outlines of a plan for the history of our laws and liberties, from their first rise and gradual progress among our British and Saxon ancestors, till their total eclipse at the Norman conquest, from which they have gradually emerged and risen to the perfection they now enjoy, at different periods of time.] It has been shown that the rules of law which

regard the *rights* of each member of the community, whether considered in an *individual*, a *relative*, or a *social* capacity, the *private injuries* which may be committed in violation of these rights, and the wrongs which affect the public, or *crimes*, [have been and are every day improving, and are now fraught with the accumulated wisdom of ages;] that the forms of administering justice have also, (particularly in our own times,) received the assiduous care of the cultivators of legal science; and that our religious, civil, and political liberties, so long depressed in popish and arbitrary times, and occasionally threatened with absolute extinction, have since, in a constant course of progressive development, commencing at the happy era of the Revolution, been effectually vindicated and established. [Of a constitution so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise which is justly and severely its due; the thorough and attentive contemplation of it, will furnish its best panegyric.]

The admiration that it is calculated to inspire should lead to some reflection on the duties which attach to citizens born to so noble an inheritance. It was the stern task of our forefathers to struggle against the tyrannical pretensions of regal power: to us, the course of events appears to have assigned the opposite care, of holding in check, the aggressions of popular licence, and maintaining inviolate the just claims of the prerogative. But, in a general view, we have only to pursue the same path that has been trodden before us,—to carry on the great work of securing to each individual of the community, as large a portion of his natural freedom as is consistent with the organization of society, and to increase, to the highest degree that the order of divine Providence permits, the benefits of his civil condition. A clearer perception of the true nature of this enterprise, of the vast results to which it tends, and of the obligations by which we are

bound to its advancement, has been bestowed on the present generation, than on any of its predecessors. May it not fail also to recollect, amidst the zeal inspired by such considerations, that the desire for social improvement degenerates, if not duly regulated, into a mere thirst for change,—that the fluctuation of the law, is itself a considerable evil;—and that, however important may be the redress of its defects, we have a still dearer interest in the conservation of its existing excellencies.

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